Opinions for Judge Mastroianni's Problems

2011 WL 3438090
Only the Westlaw citation is currently available.
United States District Court,
E.D. Pennsylvania.

Julia QUAGLIARELLO v.
Officer Joshua DEWEES, et al.

Civil Action No. 09–4870. | Aug. 4, 2011.

Attorneys and Law Firms

Harry J. Oxman, Oxman, Goodstadt, Krevitz & Kuritz, Bensalem, PA, for Julia Quagliarello.

Thomas C. Gallagher, Deasey Mahoney Valentini North Ltd., Media, PA, Christine D. Steere, McDonnell & Associates, P.C., King of Prussia, PA, for Officer Joshua Dewees, et al.

MEMORANDUM RE: MOTIONS IN LIMINE

BAYLSON, District Judge.

I. Introduction

*1 This civil rights action arises out of the stop and arrest of Plaintiff Julia Quagliarello ("Plaintiff") by Chester Police Officer Joshua Dewees ("Officer Dewees"), after Plaintiff committed a traffic violation while driving in Chester, Pennsylvania on January 29, 2009.¹ Plaintiff has sued Officer Dewees and the City of Chester (collectively, "Defendants") for violations of her rights under the United States Constitution and Pennsylvania law.

In advance of trial, Plaintiff filed two additional motions in limine.² First, Plaintiff moves to preclude Defendants from introducing into evidence photographs of Plaintiff from the social networking sites Facebook and Myspace. (ECF No. 51) Second, Plaintiff moves to preclude Defendants from 1) introducing into evidence a videotape reenacting Officer Dewees's pursuit of Plaintiff's vehicle for several blocks before Plaintiff pulled over; and 2) performing a demonstration of a police vehicle's flashing lights, siren, and horn. (ECF No. 52)

The Court heard oral argument on these motions at a hearing on August 1, 2011. At a hearing on August 4, 2011, the Court ruled from the bench as follows:

First, if Plaintiff opens the door on direct testimony to her emotional distress following the incident, the Defendants may introduce up to three photographs on cross-examination that are probative of Plaintiff's emotional state, assuming Defendants can show the photographs were taken after the date of the incident and before Plaintiff filed suit. Plaintiff will then be permitted to introduce up to three photographs on redirect to support her claim of emotional distress. Defendants may not introduce any text from Plaintiff's social networking webpages.

Second, Defendants may show the jury the portion of the video that depicts the view from the front windshield and the side window. Defendants must edit the video to eliminate the view from the rear window and the word "reenactment."

Third, Defendants will not be permitted to show the jury a demonstration of a police vehicle's siren, horn, and lights.

This Memorandum supports the Court's rulings.

II. The Parties' Contentions

With respect to the social networking sites, Plaintiff contends the photographs she posted online have no relevance to this litigation and may impute to her a negative character or reputation. Plaintiff argues the photographs should be precluded pursuant to Fed.R.Evid. 401, 402, 403, and 404. Defendants contend in their response (ECF No. 56) that Plaintiff put mental and physical condition in controversy by alleging past and future physical and mental pain, anguish, severe emotional embarrassment. and humiliation trauma. resulting from her arrest. Defendants assert that photographs, video, posts, and other content on Plaintiff's social media profiles are relevant and material to defending her emotional distress claims. At oral argument, Defendants contended that Plaintiff's photographs on Myspace tend to show that she did not exhibit psychological distress after the incident.

*2 With respect to the videotape and the demonstration of the police vehicle, Plaintiff contends they are inadmissible experiments that do not reconstruct the scene. Plaintiff asserts that the conditions in the video, such as the season, the view from the car windows, and the number of cars parked on the street, differ from the actual incident. Plaintiff also contends that the jury's observation of a police vehicle parked outside of the courthouse with flashing lights and sounding horn and siren would not resemble what Plaintiff saw and heard from her car on the day of the incident. Defendants contend in their response (ECF No. 55) that the video and the demonstration are offered as illustrations rather than reenactments. Defendants argue that the videotape will "bring context and insight that words alone cannot" to Officer Dewees's expected testimony that he followed Plaintiff for eight blocks before she stopped, although there were "numerous turn-outs where she could have stopped." Resp. at 5. Further, Defendants assert that "the police vehicle demonstration is offered to visually and audibly illustrate Officer Dewees' testimony at trial for the jury" that he activated his lights, horn, and siren. Resp. at 6. Defendants contend that the evidence is not prejudicial because Plaintiff can highlight differences between the experiments and the incident during cross-examination.

III. Legal Standard

Under Federal Rules of Evidence 401 and 402, evidence is "relevant" and generally admissible if it "tend[s] to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or

needless presentation of cumulative evidence." Fed.R.Evid. 403. Evidence is "unfairly prejudicial" if it has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one"; "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish"; or "may cause a jury to base its decision on something other than the established propositions in the case." Carter v. Hewitt, 617 F.2d 961, 972 (3d Cir.1980) (internal citations and quotation marks omitted). Evidence of character is also generally "not admissible for the purpose of proving action in conformity therewith." Fed.R.Evid. 404(a).

IV. Motion to Preclude Social Networking Evidence (ECF No. 51)

As the use of social media such as Myspace and Facebook has proliferated, so too has the value of these websites as a source of evidence for litigants. Like any evidence, photographs posted on these websites are subject to the evidentiary rules requiring relevance to the claims at issue, a legitimate purpose, and probity not substantially outweighed by unfair prejudice. For example, in United States v. Drummond, No. 1:09-cr-00159, 2010 WL 1329059 (M.D.Pa. Mar.29, 2010) (Kane, C.J.), the court found that photographs posted on Myspace depicting the defendant holding cash were relevant as circumstantial evidence of drug trafficking, but also "pose[d] a significant risk of provoking an emotional reaction from the jury—that he is a drug dealer because he looks like a drug dealer in the photos—, which is likely to outweigh the probative value of him possessing an unknown amount of cash from an unknown source." Id. at *2. The prosecution likely could present oral testimony probative of the defendant's possession of cash despite having no legitimate income, that would be less prejudicial than the photographs. Id. Judge Kane noted "it [wa]s possible that the relevance of the photos could outweigh any unfair prejudice," but withheld ruling on a motion to preclude the photos until trial. *Id.* at *2–3.

*3 Photographs from social networking sites cannot be admitted to prove bad character. In United States v. Phaknikone, 605 F.3d 1099 (11th Cir.2010), the Eleventh Circuit held that photographs posted on the defendant's Myspace profile, including a photograph depicting him in a car with a child in the backseat, while holding a handgun, with his tattoos visible, was "classic evidence of bad character, which was offered by the government to prove only 'action in conformity therewith." "Id. at 1108-09 (quoting Fed.R.Evid. 404(b)). The jury in the defendant's trial on robbery charges could "infer that, because [the defendant] is willing to publish these kinds of photographs online, under an incendiary alias, he is a gangster who is likely to rob banks," an impermissible inference under Rule 404(b). Id. at 1109. Accordingly, the appellate court held that the district court abused its discretion by admitting the photographs. Id. See also Engman v. City of Ontario, Civ. A. No. EDCV 10-284 CAS, 2011 WL 2463178, at *11 (C.D.Cal. June 20, 2011) (Snyder, (information on plaintiff's Myspace page regarding drinking and his complaints about the government were irrelevant to his claims, and inadmissible under Rule 402). Cf. United States v. Benford, Civ. A. No. 10-12801, 2011 WL 2078645, at *3 (11th Cir. May 26, 2011) (nonprecedential) (holding that photographs on Myspace showing the defendant with two of the firearms charged in the indictment were probative of his possession of the weapons, and thus admissible as intrinsic evidence not subject to Rule 404(b)).

Photographs and videotapes may be admissible to show evidence relevant to a plaintiff's claim for damages for pain and suffering, both physical and emotional. *See, e.g., Robert v. Conti Carriers & Terminals, Inc.,* 692 F.2d 22,

25 (5th Cir.1982) (affirming district court's admission of photographs showing the medical condition of plaintiff's hands, which were probative and not unfairly prejudicial with respect to damages on plaintiff's negligence claim); *Evan v. Estell*, 203 F.R.D. 172, 173 (M.D.Pa.2001) (Mannion, M.J.) (the parties agreed that a video of the plaintiff was "directly relevant to her claim for damages" where "the video surveillance presumably relates to the physical condition, disability and credibility of the plaintiff").

Where a "[p]laintiff has put her mental condition in controversy in seeking damages for emotional distress, [the defendant] has an interest in introducing evidence of other possible causes of this emotional distress." *Blakey v. Cont'l Airlines*, Civ. A. No. 93–2194, 1997 WL 1524797, at *13 (D.N.J. Sept.9, 1997) (Bassler, J.) (denying motion to preclude evidence of plaintiff's affair, a possible source of emotional stress, in plaintiff's sexual harassment lawsuit against her employer, with the intention to "revisit the issue during the trial" "when the allegations are fleshed out by the facts").

Here, Defendants submitted several pages of photographs of Plaintiff from Myspace.³ These photographs depict Plaintiff, a college student, with her friends, playing with a dog, drinking at a party (including one photo with the caption "Crazy night lol"), and riding a mechanical bull. There are headings that suggest the photos are divided into groups dated September 5, 2010, February 15, 2010, April 20, 2009, and January 27, 2008, but the date on which any individual photograph was taken is not clear.

*4 The Court has determined that some photographs of Plaintiff could be relevant to Plaintiff's claim for emotional distress. If Plaintiff testifies on direct examination regarding her emotional distress after the

incident, Defendants may show Plaintiff up to three photographs on cross-examination, provided that Defendants can prove the photographs were taken after the incident occurred and before Plaintiff filed this lawsuit. If Defendants show Plaintiff photographs, Plaintiff may rebut this evidence on re-direct by introducing up to three photographs from the same time period in support of Plaintiff's claim.

V. Motion to Preclude Video of Chase and Demonstration of Police Vehicle (ECF No. 52)

The Third Circuit "has long recognized the broad latitude of the trial judge in ruling on questions of admissibility," and that the "trial judge may have even greater latitude when dealing with demonstrative evidence per se." United States v. Rockwell, 781 F.2d 985, 987 n. 3 (3d Cir. 1986). The standard for admission into evidence is different for a reenactment and an illustration. Reenactments, like experiments, are held to a higher standard. "Experimental evidence is admissible so long as it is relevant and probative, and such evidence has probative value if the conditions of the experiment are identical with or similar to the conditions of the transactions in litigation." Glick v. White Motor Co., 458 F.2d 1287, 1294–95 (3d Cir.1972) (citing Crown Cork & Seal Co. v. Morton Pharms., Inc., 417 F.2d 921 (6th Cir.1969)) (affirming the trial court's ruling that proffered experimental evidence was not sufficiently probative to be admissible). "When confronted with photographs, films, and videotapes of experiments or demonstrations that purport to replicate actual events, courts require the party seeking to admit the evidence to prove that the experiment or demonstration was conducted under substantially similar circumstances as the actual event." Russo v. Mazda Motor Corp., Civ. A. No. 89-7955, 1992 WL 309630, at *2, *3 (E.D.Pa. Oct.19, 1992) (Huyett, J.) (citing 2 John W. Strong, et al., McCormick on Evidence

§ 214, at 19–20 (4th ed.1992)) (photographs purporting to replicate an accident were admissible "to demonstrate mechanical principles relative to the vehicle and as a visual summary of the expert's opinion").

On the other hand, evidence that is merely illustrative need not be substantially similar to the incident. "[W]hen a party seeks to introduce photographs, films, and videotapes experiments or demonstrations, not as a recreation or representation of how an accident actually happened, but instead to illustrate general principles of physics, for example, courts do not impose a substantial similarity requirement." Russo, 1992 WL 309630, at *2 (citing 2 McCormick on Evidence, supra, § 214, at 20). Any dissimilarities affect the weight rather than the admissibility of the evidence. Id. Nevertheless, a video intended to be a demonstrative exhibit but not a reenactment must meet the evidentiary requirements for admissibility, including Rule 403. See, e.g., Palmer v. Nassan, No. 10-cv-0922, 2011 WL 587982, at *2 (W.D.Pa. Feb.10, 2011) (Schwab, J.) (excluding videotaped demonstration of tasing in a civil rights suit against a police officer because "(1) this demonstrative evidence is not demonstrative of what happened to Plaintiff on the night in question ..., (2) this evidence cannot be authenticated, and (3) the little, if any probative value, is grossly outweighed by the prejudicial effect it will have on a jury.").

*5 The Court now evaluates the videotape and the proposed demonstration in this case.

A. Video

Defendants' Revised Pre-trial Memorandum (ECF No. 35) lists as a trial exhibit "Video tape of chase scene from 22nd and Monroe to 14th Street campus bus stop." Although Defendants disclaimed at oral argument and in their

response brief that the video is a "reenactment," the word "reenactment" is on the screen as the three-minute video plays. The video actually consists of three videos running simultaneously, which depict the view out of the front windshield, rear windshield, and passenger-side window of a car with similar specifications to the car Plaintiff drove on January 29, 2009. The car follows Plaintiff's route in Chester, PA on the morning of the incident, until the point where Plaintiff pulled over. A police vehicle pursues the car representing Plaintiff's car.

The view out of the front and side windows shows the residential neighborhood in which the incident took place. These views show the street intersections and the areas along the side of the road marked by yellow paint where a car could theoretically pull over. These portions of the video are probative of the defense to Plaintiff's expected testimony that there was no place for pull over. an illustrative As demonstration, the video is admissible and any differences in conditions from the day of the incident go to the video's weight rather than its admissibility. These differences can highlighted on cross-examination.

However, the view from the rear window, showing the police car in pursuit, is confusing and possibly unduly prejudicial to the Plaintiff. Therefore, Defendants must edit the video to eliminate the rear window view and remove the word "reenactment" before showing the video to the jury.

B. Police Car Outside the Courthouse

In Defendants' Revised Pre-trial Memorandum, Defendants "request that the Court permit a jury view of the City of Chester Police Department Patrol vehicle 24–56. The vehicle will be driven to the James Byrne Federal Courthouse and parked on Market Street or Sixth Street for the jury to observe: (1) the vehicle's flashing lights;

and (2) the vehicle's siren, horn, and 'beeping' as activated on January 26, 2009."

The Court holds that this proposed demonstration is not admissible. Bringing the jury outside the courthouse to listen to and view a police vehicle with its lights and siren activated is neither an experiment under substantially similar conditions as the incident, nor an illustration of a helpful principle that the jury may not understand. The Court is confident that every juror in the greater Philadelphia area has seen and heard a police vehicle with activated lights and siren. (The jurors may even see and hear police cars as they travel to and from the courthouse for their jury service.) The proposed experiment is not probative of any fact of consequence in the litigation, furthermore, would be a waste of time. Therefore, the Court will grant Plaintiff's motion to preclude the demonstration of the police vehicle.

VI. Conclusion

*6 For the reasons discussed above, the Court will grant in part and deny in part Plaintiff's Motions in Limine. An appropriate Order follows.

All Citations

Not Reported in F.Supp.2d, 2011 WL 3438090, 86 Fed. R. Evid. Serv. 21

Footnotes

- Plaintiff refers to January 29, 2009 as the date of the incident in both her briefs and in the Complaint. Defendants' briefs refer to January 26, 2009 as the date of the incident.
- On July 20, 2011, the Court issued an Order and Memorandum (ECF No. 49/50) resolving all pending motions in limine.
- At the hearing on August 1, 2011, the Court marked the color photos from Myspace Exhibit D–9A for the record.

EEOC v. Simply Storage Mgmt., LLC, 270 F.R.D. 430 (S.D. Ind. 2010)

- The EEOC filed sexual discrimination claims on behalf of multiple claimants who alleged ongoing emotional distress.
- Defendants sought all Facebook content from the claimants, including content that was "locked" or marked "private."
 - Issue: What is the scope of relevant communications, and are there any limits due to privacy concerns?
 - Holding: All content that reveals, refers, or relates to any emotion, feeling, or mental state is relevant. Standard privacy concerns about whether requested discovery is burdensome or oppressive apply, but content is not automatically shielded from discovery just because it is "locked" or marked "private."

270 F.R.D. 430 United States District Court, S.D. Indiana, Indianapolis Division.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,

v.

SIMPLY STORAGE MANAGEMENT, LLC and O.B. Management Services, Inc., Defendants.

No. 1:09-cv-1223-WTL-DML. | May 11, 2010.

Synopsis

Background: Equal Employment Opportunity Commission (EEOC) brought Title VII action on behalf of employees against employer, alleging that employer was liable for sexual discrimination by supervisor.

Holdings: Following telephone discovery conference, the District Court, Debra McVicker Lynch, United States Magistrate Judge, held that:

- [1] production of portions of employees' social networking site content was appropriate, and
- [2] employees were not required to produce information about their prior work history.

Ordered accordingly.

West Headnotes (13)

[1] Federal Civil Procedure

←Scope

Where the relevance of any nonprivileged matter is in doubt, the rule provision establishing the scope of discovery indicates that the court should be permissive in allowing discovery. Fed.Rules Civ.Proc.Rule 26(b)(1), U.S.C.A. 28.

1 Cases that cite this headnote

[2] Federal Civil Procedure

←Scope

The scope of relevancy under the discovery rule is extremely broad, but it is not without its limits. Fed.Rules Civ.Proc.Rule 26, U.S.C.A. 28.

2 Cases that cite this headnote

[3] Federal Civil Procedure

→ Particular Subject Matters

Content from a social networking site (SNS) is not shielded from discovery simply because it is "locked," meaning that the SNS user has decided that only other SNS users who have obtained

permission may view the profile, or "private."

3 Cases that cite this headnote

[4] Privileged Communications and Confidentiality

←Privacy in general

Although privacy concerns may be germane to the question of whether requested discovery is burdensome or oppressive and whether it has been sought for a proper purpose in the litigation, a person's expectation and intent that her communications be maintained as private is not a legitimate basis for shielding those communications from discovery.

1 Cases that cite this headnote

[5] Federal Civil Procedure

←Particular Subject Matters

Content from a social networking site (SNS) must be produced during discovery when it is relevant to a claim or defense in a case.

3 Cases that cite this headnote

[6] Federal Civil Procedure

←Particular Subject Matters

Although the contours of social communications relevant to an employee's mental and emotional health

for purposes of discovery in a Title VII action are difficult to define, that does not mean that everything from an employee's social networking site (SNS) profile must be disclosed in discovery. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4 Cases that cite this headnote

Federal Civil Procedure →Particular Subject Matters

For purposes of discovery, the simple fact that an employee in a Title VII action has had social communications is not necessarily probative of particular mental and emotional health matters at issue in the case; rather, it must be the substance ofthe communication that determines relevance. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

6 Cases that cite this headnote

[8] Federal Civil Procedure →Particular Subject Matters

Production of portions of employees' social networking site (SNS) content was appropriate in Title VII action against employer, alleging sexual harassment by supervisor; it was reasonable to expect employees' alleged severe emotional or mental injury to manifest itself in some SNS content, and information evidenced that other stressors that could have produced distress alleged emotional

nonprivileged matter that was relevant to claim. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4 Cases that cite this headnote

Federal Civil Procedure Particular Subject Matters

Appropriate scope of production of employees' social networking (SNS) content in Title VII action against employer, alleging sexual harassment by and supervisor, severe emotional distress resulting from alleged harassment, was any profiles, postings, or messages, including status updates, wall comments, causes joined, groups joined, activity streams, and blog entries, and SNS applications for employees that revealed, referred, or related to any emotion, feeling, or mental state, as well as communications that revealed, referred, or related to events that could reasonably expected to produce significant emotion, feeling, or mental state. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5 Cases that cite this headnote

[10] Federal Civil Procedure →Particular Subject Matters

Appropriate scope of production of third-party communications to employees on social networking site (SNS) in Title VII action against employer, alleging sexual harassment by

supervisor, severe emotional and distress resulting from alleged harassment, was any communications that put employees' own communications on SNS in context. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Cases that cite this headnote

[11] Federal Civil Procedure

←Photographs; right to take photographs in general

Pictures of employee taken during relevant time period and posted on employee's social networking (SNS) profile would generally be discoverable in Title VII action against employer, alleging sexual harassment by supervisor, and severe emotional distress resulting from alleged harassment, since context of pictures and employee's appearance might reveal employee's emotional or mental status, but any picture posted on third party's SNS profile in which employee was merely "tagged," meaning third party posted picture and linked people in picture to their profiles so that picture would appear in profiles of person who tagged people in picture, as well as on profiles of people who were identified in picture, was less likely to be relevant. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3 Cases that cite this headnote

Depositions and Discovery

Discovery is intended to be a self-regulating process that depends on the reasonableness and cooperation of counsel. Fed.Rules Civ.Proc.Rule 37(a)(1), U.S.C.A. 28.

Cases that cite this headnote

[13] Federal Civil Procedure

Employment, records of

Employees were not required to produce information about their prior work history in Title VII action against employer, alleging sexual harassment by supervisor, absent showing by employer that requested information was relevant to its defenses in action. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Cases that cite this headnote

Attorneys and Law Firms

*431 Jo Ann Farnsworth, EEOC, Laurie A. Young, Michelle Eisele, Robin M. Lybolt, U.S. Equal Employment Opportunity Commission, Indianapolis, IN, for Plaintiff.

Andrew M. McNeil, Daniel C. Emerson, Emily L. Yates, Bose Mckinney & Evans, LLP, Indianapolis, IN, for Defendants.

[12] Federal Civil Procedure

*432 Order on Discovery Issues Raised During

April 21 Conference

DEBRA McVICKER LYNCH, United States Magistrate Judge.

The parties appeared by counsel for a telephone discovery conference on April 21, 2010, and presented two issues: (1) whether two of the claimants must produce the internet social networking site (SNS) profiles¹ and other communication from their Facebook and *MySpace.com* accounts, and (2) whether the EEOC must produce information about the claimants' prior employment since 2003, including the names and addresses of the employers, dates of employment, positions held, and reasons for separation. After directing the parties to submit any pertinent decisions they wish the court to consider, the court took the matters under advisement.

Facts

On September 29, 2009, the EEOC filed a complaint on behalf of two named claimants and similarly situated individuals who allege the defendant businesses (collectively referred to in this Order as "Simply Storage") are liable for sexual harassment by a supervisor. The EEOC amended its complaint in November 2009 to sue different defendants, but the EEOC did not change its substantive allegations or the named claimants. See Dkt. 7.

On April 16, 2010, the EEOC requested a discovery conference because counsel for the parties disagree about the proper scope of discovery as it relates to the two issues identified above. These disputes affect both pending written discovery requests and the scope of upcoming depositions. The disputed requests for production of documents that seek SNS information are:

REQUEST NO. 1: All photographs or videos posted by Joanie Zupan or anyone on her behalf on Facebook or MySpace from April 23, 2007 to the present.

REQUEST NO. 2: Electronic copies of Joanie Zupan's complete profile on Facebook and MySpace (including all updates, changes, or modifications to Zupan's profile) and all status updates, messages, wall comments, causes joined, groups joined, activity streams, blog entries, details, blurbs, comments, and applications (including, but not limited to, "How well do you know me" and the "Naughty Application") for the period from April 23, 2007 to the present. To the extent electronic copies are not available, please provide the documents in hard copy form.

REQUEST NO. 3: All photographs or videos posted by Tara Strahl or anyone on her behalf on Facebook or MySpace from October 11, 2007 to November 26, 2008.

REQUEST NO. 4: Electronic copies of Tara Strahl's complete profile on Facebook and MySpace (including all updates, changes, or modifications to Strahl's profile) and all status updates, messages, wall comments, causes joined, groups joined, activity streams, blog entries, details, blurbs, comments, and applications (including, but not limited to, "How well do you know me" and the "Naughty Application") for the period from October 11, 2007 to November 26, 2008. To the extent electronic copies are not available, please provide these documents in hard copy form.

Dkt. 38 Ex. 1.

The disputed interrogatory that seeks information related to prior employment history is:

INTERROGATORY NO. 2: For Martin, Burkett, and all similarly situated individuals,

identify each employer since January 1, 2003 to the present, including dates of employment, positions held, and reason for leaving.

Id.

The EEOC objects to production of all SNS content (and to similar deposition questioning) on the grounds that the requests are overbroad, not relevant, unduly burdensome because they improperly infringe on claimants' privacy, and will harass and embarrass the claimants. See Dkt. 33. Simply Storage claims that discovery of these matters is *433 proper because certain EEOC supplemental discovery responses place the emotional health of particular claimants at issue beyond that typically encountered with "garden variety emotional distress claims." Dkt. 43-1. Simply Storage's Interrogatory No. 4 asked for details about the EEOC's damage calculation, and the EEOC responded in pertinent part:

> [I]t is known that Bunny Baker, Marilou Burkett, and Ellen Martin sustained "garden variety" and non ongoing emotional distress in association with the sexual harassment they endured. which includes emotional pain and suffering, loss of enjoyment of life, anxiety, fear, bitterness, humiliation, embarrassment inconvenience. They do not ongoing emotional claim harm. Defendants' sexually hostile workplace increased Tara Strahl's anxiety for which she sought medical treatment. As a result of the harassment sexual experienced, Joanalle Zupan became depressed and suffers from post traumatic stress

disorder.

Id. Simply Storage's Interrogatory No. 8 requested information about any medical or psychological counseling or treatment the claimants had sought related to their employment with Simply Storage and the EEOC responded in pertinent part:

Joanalle Zupan, beginning in August of 2009, has sought treatment for depression and post traumatic stress ... and later counseling.... She is scheduled to see psychiatrist Maleakal Mathew, M.D. in May 2010. Ms. Strahl sought treatment from her physician Jackie Evans, M.D. for increased anxiety sometime in March of 2008.

Id.

As for information about the claimants' prior employment, Simply Storage argues that these requests are commonplace. Pressed for an articulation of relevance, Simply Storage explains that training the claimants could have received from former employers about sexual harassment, including how to report it, may be pertinent to their allegations in this case.

Discussion

[1] [2] The Rule 26 standard is broad. Rule 26(b), entitled "Discovery Scope and Limits," provides:

(1).... Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense —

including the existence, description, nature, custody, condition. and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.... All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

"[W]here relevance is in doubt, [Rule 26(b)(1)] indicates that the court should be permissive." **Truswal** Systems Corp. ν. Hydro-Air Engineering, Inc., 813 F.2d 1207, 1212 (Fed.Cir.1987). The scope of relevancy under Rule 26 is "extremely broad," but it is not without its limits. Rozell v. Ross-Holst, 2006 WL. 163143. (S.D.N.Y.2006). *2 The limitations Rule 26(b)(2)(C) provides on otherwise relevant discovery are:

On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties'

resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

*434 Discovery of Two Claimants' Social Networking Sites

A. General Principles Applicable to Discovery of SNS

The EEOC does not argue that Facebook and MySpace profiles contain no relevant information. It insists, however, that production should be limited to content that directly addresses or comments on matters alleged in the complaint. Simply Storage contends that the nature of the injuries Ms. Zupan and Ms. Strahl have alleged implicates all their social communications (*i.e.*, *all* their Facebook and MySpace content).

Discovery of SNS requires the application of basic discovery principles in a novel context. And despite the popularity of SNS and the frequency with which this issue might be expected to arise, remarkably few published decisions provide guidance on the issues presented here. At bottom, though, the main challenge in this case is not one unique to electronically stored information generally or to social networking sites in particular. Rather, the challenge is to define appropriately broad limits nevertheless—on limits—but discoverability of social communications in light of a subject as amorphous as emotional and mental health, and to do so in a way that provides meaningful direction to the parties. The court will first outline the principles it will apply in confronting this challenge.

1. SNS content is not shielded from discovery simply because it is "locked" or "private."

[3] [4] Although privacy concerns may be

germane to the question of whether requested discovery is burdensome or oppressive and whether it has been sought for a proper purpose in the litigation, a person's expectation and intent that her communications be maintained as private is not a legitimate basis for shielding those communications from discovery. Two decisions factually similar to this one have recognized this threshold point. See Leduc v. Roman, 2009 CanLII 6838 (ON S.C.), and Murphy v. Perger (ON S.C.). In these cases, the courts held that a requesting party is not entitled to access all non-relevant material on a site, but that merely locking² a profile from public access does not prevent discovery either. See also Mackelprang v. Fidelity Nat'l Title Agency of Nevada, Inc., 2007 WL 119149 (D.Nev.2007). As other cases when privacy confidentiality concerns have been raised, those interests can be addressed by an appropriate protective order, like the one already entered in this case.

2. SNS content must be produced when it is relevant to a claim or defense in the case.

[5] [6] Simply Storage argues that all the content of Ms. Zupan's and Ms. Strahl's social networking sites is relevant, must be produced, and can be the subject of questioning during their depositions. Although, as noted above, the contours of social communications relevant to a claimant's mental and emotional health are difficult to define, that does not mean that everything must be disclosed. Simply Storage has cited one decision in which the court did require production of the plaintiff's entire SNS profile, but that case is distinguishable in a number of ways. In Bass v. Miss Porter's School, 2009 WL 3724968, *1 (D.Conn.2009), the defendant had served discovery requests much narrower than those Simply Storage has served. The defendant in Bass had not asked for complete Facebook and MySpace profiles but for documents related to the plaintiff's alleged

"teasing and taunting" and those representing or relating to communications between the plaintiff and anyone else "related to the allegations in [the] Amended Complaint." Id. at *1. The court's in camera review demonstrated that the plaintiff's choice of documents responsive to the defendants' requests was vastly underinclusive. It therefore overruled her "undifferentiated objection" and provided the complete Facebook profile to the defendant. The discovery issue in this case is substantively and procedurally different. Here, the parties have sought the *435 court's ruling on the EEOC's objections before the production; there is no contention that the EEOC's production is deficient. The procedure employed in Bass could be appropriate should a further dispute arise regarding the EEOC's compliance with this order, but the result in Bass does not convince the court that production of the claimants' complete SNS content should be required in the first instance.

^[7] Moreover, the simple fact that a claimant has *had* social communications is not necessarily probative of the particular mental and emotional health matters at issue in the case. Rather, it must be the substance of the communication that determines relevance. *See Rozell v. Ross–Holst*, 2006 WL 163143 (S.D.N.Y. Jan.20, 2006). As the *Rozell* court put it,

To be sure, anything that a person says or does might in some theoretical sense be reflective of her emotional state. But that is hardly justification for requiring the production of every thought she may have reduced to writing or, indeed, the deposition of everyone she may have talked to.

Id. at *3–4.

For example, if a claimant sent a message to a friend saying she always looks forward to going to work, the person to whom she sent the message and the substance of the message are what should be considered to determine whether the message is relevant. (And that message would be relevant in this case.) But the mere the claimant has made fact that communication is not relevant because it is not probative of a claim or defense in this litigation. The Rozell decision also notes, however, that the defendant may argue the absence of relevant communications casts doubt on the plaintiff's claims. See id. at *3.

3. Allegations of depression, stress disorders, and like injuries do not automatically render all SNS communications relevant, but the scope of relevant communications is broader than that urged by the EEOC.

In *Mackelprang*, 2007 WL 119149, the defendants had obtained the plaintiff's public MySpace profile after she had alleged sexual harassment claims against them. The court held that the defendants could discover private messages exchanged with third parties that contain information regarding her sexual harassment allegations or her alleged emotional distress. *Id.* at *8. The court expressly ruled, however, that emails consisting of sexually explicit communications between the plaintiff and third persons and that did not relate to her employment with the defendants were not discoverable. *Id.*

A similar situation was presented in *Rozell*, 2006 WL 163143, at *3, where the court rejected the defendants' claim that the plaintiff who had alleged sexual harassment should produce all of her email communications. When the plaintiff had complained about the supervisor, the supervisor retaliated by hacking into her emails. The defendants had requested the disclosure of all emails in the plaintiff's

account, but the court required production of only the intercepted emails. *Id.* The court reasoned the contents of those emails were relevant to assess plaintiff's claimed damages. *Id.*

^[8] It is reasonable to expect severe emotional or mental injury to manifest itself in some SNS content, and an examination of that content might reveal whether onset occurred, when, and the degree of distress. Further, information that evidences other stressors that could have produced the alleged emotional distress is also relevant. *See Doe v. Smith*, 470 F.3d 331, 341 (7th Cir.2006). Thus, the court determines that some SNS discovery is appropriate here. The next question is the permissible scope of that discovery.

The EEOC's view that the claimants should be required to produce only communications that directly reference the matters alleged in the complaint is too restrictive. This standard likely encompass clearly would not relevant communications and in fact would tend only to yield production of communications supportive of the claimants' allegations. It might not, for example, yield information inconsistent with the claimants' allegations of injury or about other potential causes of the injury. And although some employees may note occurrences of harassment *436 on their profiles, not many employees would routinely note non-events on their profiles, such as, "My supervisor didn't sexually harass me today." A definition of relevant SNS content broader than that urged by the EEOC is therefore necessary.

B. The Scope of SNS Discovery to Be Permitted in this Case

1. The Claimants' Verbal Communications

^[9] With these considerations in mind, the court determines that the appropriate scope of

relevance is any profiles, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) and SNS applications for claimants Zupan and Strahl for the period from April 23, 2007, through the present that reveal, refer, or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state.

2. Third-party Communications

[10] Third-party communications to Ms. Zupan and Ms. Strahl must be produced if they place these claimants' own communications in context.

3. Photographs and Videos

[11] The parties have also raised the production of photographs depicting each of the claimants or the pictures posted on their profiles in which they do not appear as an issue distinct from the disclosure of communications. The same test set forth above can be used to determine whether particular pictures should be produced. For example, pictures of the claimant taken during the relevant time period and posted on a claimant's profile will generally be discoverable because the context of the picture and the claimant's appearance may reveal the claimant's emotional or mental status. On the other hand, a picture posted on a third party's profile in which a claimant is merely "tagged," is less likely to be relevant. In general, a picture or video depicting someone other than the claimant is unlikely to fall within the definition set out above. These are general guidelines provided for the parties' reference and not final determinations of what pictures must be produced consistent with the guidelines above.

C. Further Considerations

1. Carrying Out this Order

The court's determination of relevant material is crafted to capture all arguably relevant materials, in accord with the liberal discovery standard of Rule 26. In carrying out this Order, the EEOC should err in favor of production.

[12] The court acknowledges that it has not drawn these lines with the precision litigants and their counsel typically seek. But the difficulty of drawing sharp lines of relevance is not a difficulty unique to the subject matter of this litigation or to social networking communications. Lawyers are frequently called upon to make judgment calls—in good faith and consistent with their obligations as officers of the court—about what information is responsive to another party's discovery requests. Discovery is intended to be a self-regulating process that depends on the reasonableness and cooperation of counsel. Fed.R.Civ.P. 37(a)(1). Here, in the first instance, the EEOC's counsel will make those determinations based on the guidelines the court has provided. As with discovery generally, Simply Storage can further inquire of counsel and the claimants (in their depositions) about what has and has not been produced and can challenge the production if it believes the production falls short of the requirements of this order. Nothing in this Order is intended to foreclose such follow-up procedures. Moreover, this Order does not prevent Simply Storage from seeking additional materials should discovery suggest they are probative of a claim or defense.

*437 2. Limitations of this Order

This Order is directed toward two claimants who have alleged severe emotional distress, including post-traumatic stress disorder; it does

not address the proper scope of discovery for "garden variety emotional distress claims." Production of the information required by this Order also obviously does not preclude objections to admissibility at a later stage or requests for return of produced materials if the litigation develops in a direction that casts doubt on its relevance.

3. Privacy Concerns

The court agrees with the EEOC that broad discovery of the claimants' SNS could reveal private information that may embarrass them. Other courts have observed, however, that this is the inevitable result of alleging these sorts of injuries. Further, the court finds that this concern is outweighed by the fact that the production here would be of information that the claimants have already shared with at least one other person through private messages or a larger number of people through postings. As one judge observed, "Facebook is not used as a means by which account holders carry on monologues with themselves." Leduc, 2009 CanLII 6838, at ¶ 31. The court has entered an agreed protective order that limits disclosure of certain discovery materials, and counsel should confer about whether that protection is appropriate here.

Information about Prior Employment

[13] Although the parties' first dispute concerning SNS communication production is novel, the second dispute is straightforward, as is its resolution. This court has already determined that defendants must demonstrate

Footnotes

why past work history information is relevant to the particular claims and defenses in that case to receive production of this information. See Woods v. Fresenius Med. Care Group of N. Amer., 2008 WL 151836 (S.D.Ind. Jan.16, 2008). Simply Storage's assertion that it needs this information to determine the extent of the claimants' prior training on sexual harassment issues is not plausible. Its particular requests dates of employment, positions held, and reason for leaving—are not directed at that issue at all. Simply Storage has not shown how the requested employment information is relevant to its defenses in this case. Absent that showing, the EEOC is not required to produce the requested information about the claimants' prior employment.

Conclusion

The EEOC must produce relevant SNS communications for Ms. Zupan and Ms. Strahl consistent with the guidelines explained above. It is not required to produce the requested information about the claimants' prior employment, without a further showing of relevance.

So ORDERED.

All Citations

270 F.R.D. 430, 110 Fair Empl.Prac.Cas. (BNA) 49

- The court interprets "profile" to mean any content—including postings, pictures, blogs, messages, personal information, lists of "friends" or causes joined—that the user has placed or created online by using her user account.
- SNS profiles typically have privacy options that allow SNS users to determine who may view their profile. "Locking" a profile from public view means that the SNS user has decided that only other SNS users who have obtained permission may view the profile.
- "Tagging" is the process by which a third party posts a picture and links people in the picture to their profiles so that the picture will appear in the profiles of the person who "tagged" the people in the picture, as well as on the profiles of the people who were identified in the picture.

<u>Telewizja Polska USA, Inc. v. Echostar Satellite Corp.</u>, 2004 WL 2367740 (N.D. Ill. Oct. 15, 2004)

- Defendant sought to include an exhibit, consisting of screenshots from from the Internet Archive (a/k/a the Wayback Machine), purporting to show what Plaintiff's website looked like on a certain date three years earlier. The exhibit was accompanied by an affidavit from an Internet Archive employee verifying that the screenshots came from their archives.
- Plaintiff filed a motion *in limine* to exclude the exhibit, arguing that it was not properly authenticated.
 - Issue: Is the Internet Archive a valid method of authenticating the website?
 - Holding: Yes. Even though the Internet Archive does not fit neatly into the non-exhaustive examples listed in FRE 901, and even though it is a relatively new source, Plaintiff presented no evidence that the Internet Archive is unreliable or that it was not a true representation in this case. Plaintiff remained free to raise concerns about reliability with the jury.

2004 WL 2367740 United States District Court, N.D. Illinois, Eastern Division.

TELEWIZJA POLSKA USA, INC. a Delaware Corporation, Plaintiff,

ECHOSTAR SATELLITE CORPORATION, a Colorado corporation, Defendant.

No. 02 C 3293. | Oct. 15, 2004.

Attorneys and Law Firms

Phillip Jay Zisook, Paul M. Levy, Brian D. Saucier, Deutsch, Levy & Engel, Chicago, IL, for Plaintiff.

Mitchell Alan Orpett, Douglas C. Crone, Tribler, Orpett & Crone, Chicago, IL, Ross W. Wooten, David M. Noll, T. Wade Welch & Associates, Houston, TX, for Defendant.

MEMORANDUM OPINION AND ORDER

KEYS, Magistrate J.

*1 Currently before the Court are Plaintiff's 17 Motions in Limine and Defendant's 38 Motions in Limine. The Court will address each party's Motions in turn.

DISCUSSION

A Motion *in Limine* should be granted only if the evidence clearly is not admissible for any purpose. *See Hawthorne Partners v. AT & T Technologies, Inc.*, 831 F.Supp. 1398, 1400 (N.D.III.1993). Generally, motions *in limine* are disfavored. Instead of barring evidence before trial, the preferred practice is to resolve questions of admissibility as they arise. *See Scarboro v. Travelers Ins. Co.*, 91 F.R.D. 21, 22 (E.D.Tenn.1980). By deferring evidentiary rulings until trial, courts can properly resolve questions of foundation, relevancy, and prejudice. *See Hawthorne Partners*, 831 F.Supp. at 1401.

I. Plaintiff's Motions in Limine

Plaintiff has filed seventeen separate motions *in limine*. A number of those motions attack the propriety of allowing Defendant to proceed with several affirmative defenses, based upon the evidence produced—or not produced—during discovery. Because a motion *in limine* is not the appropriate vehicle for addressing the strength

of the evidence or the substance of a complaint, *See Mid–America Tablewares, Inc. v. Mogi Trading Co.*, 100 F.3d 1353, 1362 (7th Cir.1996), the Court denies these motions in a fairly cursory manner.

In its First Motion in limine, Plaintiff argues that Defendant should be prohibited from arguing that it was entitled to sell subscriptions after the parties' contract was terminated. Plaintiff notes that in Polska USA, Inc. v. Echostar, No. 02-4332, 2003 WL 21579968, (7th Cir. July 7, 2003), the Seventh Circuit reversed the district court's conclusion that the only permissible interpretation of the parties' contract permitted Defendant to sell subscriptions during the posttermination period. In reversing the dismissal of Plaintiff's breach of contract claim, the Seventh Circuit stated that the more natural reading of the parties' contract prohibited Defendant from selling subscriptions to the Polska programming after it received Plaintiff's notice of termination. Plaintiff asserts that the law of the case doctrine bars Defendant from arguing that its conduct (ie. selling subscriptions after the termination of the contract) was permissible, because the Seventh Circuit has held otherwise.

Law of the case is a judicially created doctrine that seeks to limit repeated appeals of issues that have already been decided. *Gertz v. Welch*, 680 F.2d 527 (7th Cir.1982). While a district court is not free to disregard an appellate ruling, the court may rule on issues not directly decided on appeal. *Id.* at 532 (noting that the law of the case doctrine is not an "immutable rule," depriving the court of jurisdiction over an issue, but is rather a prudential limitation.)

In this case, the Seventh Circuit found that Plaintiff's Complaint stated a cognizable breach of contract claim. On September 1, 2004, Judge Guzman issued a Memorandum Opinion and Order, finding that Defendant was, nevertheless, "free to argue that it had the right to [sell

subscriptions during the post-termination period] because the contract did not explicitly forbid its conduct." *Telewizja Polska USA, Inc. v. Echostar Satellite Corp.*, No. 02 C 3293 (N.D.Ill. Sept. 1, 2004). Because Judge Guzman has decided that the Seventh Circuit's ruling does not prevent Defendant from arguing that its conduct is authorized under the parties' contract, the Motion is denied

*2 Next, Plaintiff seeks to exclude evidence and testimony supporting Defendants's counterclaim for tortious interference with prospective economic advantage, in its Second Motion in limine. Plaintiff argues that Defendant should be precluded from presenting such evidence, because Defendant failed to produce any evidence in support of its tortious interference claim. The Court agrees that Defendant should not be permitted to introduce evidence at trial that it refused to produce during discovery. However, the Court finds that Plaintiff's argument here—that the evidence that Defendant has produced is insufficient to support a claim for tortious interference—is better reserved for a summary judgment motion. KRW Sales Inc. v. Kristel Corp., No. 93 C 4377, 1994 WL 75522, at *1 (N.D.III. Mar.8, 1994) (motions in limine should be utilized for resolving evidentiary, not substantive, disputes). Plaintiff's Second Motion in limine is denied.

Plaintiff seeks to exclude evidence and testimony supporting Defendant's defamation counterclaim, because Defendant has allegedly failed to produce sufficient evidence in support of this claim. Plaintiff is again seeking a substantive ruling on the sufficiency of Defendant's evidence. The Court denies Plaintiff's Third Motion *in limine*.

In Motion *in limine* 4, Plaintiff claims that, because one of Defendant's officers acknowledged that Defendant was withholding revenue payments, Plaintiff's alleged statement

that Echostar was "scamming" Polska was not defamatory. Plaintiff is asking the Court to weigh the evidence and determine whether Defendant has enough evidence in support of its defamation counterclaim to warrant a trial. Because Plaintiff is improperly seeking a ruling on the substance of Defendant's defamation claim, Motion *in limine* 4 is denied.

Plaintiff seeks to prevent Defendant from trial introducing at amendments to the deposition testimony of Michael Mr. Schwimmer. Federal Rule 30(e) allows a witness to review his deposition transcript and make " 'any changes in form or substance" ' to the answers. Hawthorne Partners v. AT & T Technologies, Inc., 831 F.Supp. 1398, 1406 (N.D.III.1993) (quoting Lugig v. Thomas, 89 F.R.D. 639, 641 (N.D.Ill.1981)). The witness must provide a specific reason for each change made; a blanket, conclusory explanation is insufficient. However, "[a] witness can make changes that contradict the original answers, and the reasons given need not be convincing." Hawthorne, 831 F.Supp. at 1406. Courts usually allow such amendments, and stress the fact that these changes can be inquired into on cross examination. *Hawthorne*, 831 F.Supp. at 1407; Sanford v. CBS, Inc., 594 F.Supp. 713, 715 (N.D.III.1984) (noting that courts typically are reluctant to strike these changes.)

In the instant case, Mr. Schwimmer is not seeking to directly contradict his deposition testimony, but rather to "explain" or put into context answers given during his deposition. See, e.g., Thorn v. Sundstrand Aerospace Corp., 207 F.3d 383, 389 (7th Cir.2000) (noting that, while it seems dubious to permit a deponent to change his testimony from what he said to what he meant to say via subsequent affidavit, Rule 30(e) clearly permits the practice.) While Mr. Schwimmer offered has the identical explanation for each requested change, it is not for the Court "to examine the sufficiency,

reasonableness or legitimacy of the reasons for the change"—that is reserved for the trier of fact. *Lugtig*, 89 F.R.D. at 641. Plaintiff is free to explore the distinctions between Mr. Schwimmer's deposition testimony and amended testimony at trial. Motion *in limine* 5 is denied.

*3 In Motion *in limine* 6, Plaintiff seeks to prevent Defendant from introducing evidence and testimony relating to Defendant's lost profits and lost business. Plaintiff asserts that the evidence is inadmissible, because Defendant failed to produce relevant tax returns, evidence of lost subscription sales, and other responsive evidence. Defendant counters that it has produced all relevant, non-privileged evidence, and notes that Plaintiff's reliance upon Illinois state caselaw is misplaced.

Defendant's failure to produce its tax returns and other requested evidence prevents Defendant from introducing such evidence at trial. However, there is no rule stating that a tax return is the exclusive method for proving damages or lost business. The issue of whether Defendant will be unable to establish damages absent this evidence should be addressed in a summary judgment motion.

The cases relied upon by Plaintiff are readily distinguishable, as they involved an Illinois procedural rule not applicable in the instant case, see Hawkins v. Wiggins, 92 Ill.App.3d 278, 47 Ill.Dec. 866, 415 N.E.2d 1179 (Ill.App.1980); Smith v. P.A.C.E.Ill.App.3d 1067, 257 Ill.Dec. 158, 753 N.E.2d 353 (Ill.App.2001) (both applying Illinois Supreme Court Rule 237(b)), or a courtimposed sanction for failing to comply with a court's discovery order, pursuant to Federal Rule 37, see Govas v. Chalmers, 965 F.2d 298 (7th Cir.1992), which cannot be invoked in the instant case, because there has been no court order compelling discovery. See FineLine Distributors, Inc. v. Rymer Meats, Inc., No. 93 C 5685, 1994 WL 376283, at *4 (N.D.Ill. July 15, 1994) ("the cases interpreting Rule 37(b) clearly establish that the Court should only issue sanctions pursuant to Rule 37(b) for a violation of a court order regarding discovery.")

The Court will grant Plaintiff's Motion, to the extent that Plaintiff seeks to preclude Defendant from introducing evidence that it refused to produce during discovery. But absent evidence that Defendant's failure to produce the documents was in violation of a court order, or was otherwise wilful, the Court denies Plaintiff's Motion.

In its Seventh Motion *in limine*, Plaintiff seeks to preclude Defendant from introducing any evidence in support of its affirmative defenses of waiver, estoppel, ratification, assumption of the risk, failure to mitigate, and unclean hands. Once again, Plaintiff bases its Motion, largely, upon its claim that Defendant's evidence fails to raise a genuine issue of material fact with regard to these claims. Because substantive rulings should be reserved for substantive motions, Plaintiff's Seventh Motion *in limine* is denied.

Similarly, Plaintiff's Eighth Motion *in limine*, seeking to bar Defendant's affirmative defenses of estoppel, unclean hands, and laches, is an attack on the substance of Defendant's affirmative defenses, and is, therefore, denied.

Plaintiff's Ninth, Twelfth, and Thirteenth Motions in limine seek to preclude any evidence in support of Defendant's Thirteenth and Fifteenth Affirmative Defenses, and its Illinois Uniform Deceptive Trade Practices Act Counterclaim, respectively. These Motions are denied as moot, however, as Judge Guzman has already granted Plaintiff's Motion to Strike these same affirmative defenses and counterclaim. See Telewizja Polska USA, Inc. v. Echostar Satellite Corp., No. 02 C 3293 (Sept. 1, 2004).

*4 In its Tenth Motion *in limine*, Plaintiff moves for an Order finding that Defendant is a public figure for purposes of its counterclaims. The United States Supreme Court recognizes two classes of public figures: 1) those who are public figures for all purposes; and 2) those who are public figures for a particular public controversy. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

To determine whether an entity is a limited purpose public figure, courts look to "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* at 352. The Court disagrees that Defendant's mere status as a satellite provider renders it a public figure. Nevertheless, Plaintiff has demonstrated that Defendant has sufficiently interjected its position on the controversy into the public realm so as to warrant labeling it a public figure for purposes of this defamation action.

After Plaintiff's programming was pulled from the air, Defendant repeatedly ran a message promoting its version of the events giving rise to the cancellation on the station formerly broadcasting Plaintiff's shows. Defendant had the opportunity to counter Plaintiff's alleged attacks on its reputation, as well as to shape public opinion on the issue by directly addressing the non-party individuals most interested in the controversy. Under these circumstances, this Court is of the opinion that Defendant is a limited purpose public figure. Therefore, Plaintiff's Tenth Motion *in limine* is granted, in part.

Plaintiff's Eleventh Motion *in limine* seeks to prevent Defendant from introducing any evidence in support of its fourteenth affirmative defense of mistake. Once again, Plaintiff's

attack on the substance of Defendant's affirmative defense and the sufficiency of Defendant's evidence is better left to a summary judgment motion. Notably, Judge Guzman denied Plaintiff's Motion to Strike Defendant's Fourteenth Affirmative Defense in his September 1, 2004 Memorandum Opinion and Order. *Telewizja Polska USA*, *Inc. v. Echostar Satellite Corp.*, No. 02 C 3293, at *10 (N.D.III. Sept. 1, 2004).

In its Fourteenth Motion *in limine*, Plaintiff moves to preclude Defendant from introducing any exhibits that it has produced as translations performed by a company identified as Transtelecom. The exhibits purport to transcribe emails from unidentified individuals to Plaintiff's officers, in both the original Polish text and English translations, provided by Transtelecom. Plaintiff attacks the admissibility of the exhibits on numerous fronts. The most persuasive attack goes to the accuracy of the translations; the translations are obviously inaccurate on their face.

The exhibits consist of email communications between two alleged consumers and Plaintiff's President, Mr. B.M. Spanski. Both consumers express their frustration, in Polish, with the termination of the Polonia program. Mr. Spanski responded in kind, offering both individuals the *identical* response. Despite the fact that Mr. Spanski gave the same response—verbatim—to both individuals, Transtelecomm has translated the responses quite differently.

*5 Specifically, Transtelecomm interprets the first two sentences of Mr. Spanski's response to a Ms. Barbara Malewicz as follows: "Dish Network ordered us to give them full rights to distribute TV Polonia in the United States. We could not agree to those terms, nor will we agree to those terms, I am very sorry it has come to this." Conversely, Transtelecomm interprets the first two sentences of Mr. Spanski's identical

response to "CAC2201" as "Dish Network worked hard to reach an agreement with TV Polonia U.S. sales agent to allow to continue delivering television channels into your homes. There are a lot of unhappy people with this situation."

Defendant offers no explanation for the obvious differences between the translations, and the differences are significant. In this case, Defendant has alleged that Plaintiff defamed it, in part, by claiming that Defendant was demanding exclusive rights to distribute TV Polonia. The translation of Mr. Spanski's response to Ms. Malewicz strongly supports Plaintiff's claim, while the translation of Mr. Spanski's response to CAC2201 is far more benign.

However, a party challenging the authenticity or accuracy of a translation bears the burden of presenting a competing translation, permitting the trier of fact to chose which version to credit. *United States v. Briscoe*, 896 F.2d 1476, 1492 (7th Cir.1990). In this case, Plaintiff has not offered a competing translation of the emails. Defendant has, however, substantially eased Plaintiff's burden in attacking the accuracy of Defendant's translations.

Next, Plaintiff states that the inaccurate translations are evidence of sanctionable conduct on Defendant's part. The Court disagrees that the translations, standing alone, are sufficient evidence of sanctionable conduct. The translations could be the result of honest human error. There is simply not enough evidence before the Court to sanction Defendant at this time.

Finally, "[a] judge is entitled to exclude unreliable evidence." *Dugan v. R.J. Corman R. Co.*, 344 F.3d 662, 669 (7th Cir.2002). If the litigants were trying this case before this Court, the Court would likely strike both translations as

being inherently unreliable. However, this close decision is better left to the trial judge. Motion denied.

Plaintiff's Fifteenth Motion in limine seeks to bar Defendant from introducing an exhibit to prove what Polska's website looked like on various dates in 2001. The exhibit is potentially damaging, as it purports to show Polska advertising DISH Network as a provider of T.V. Polonia on Polska's website after the expiration of the contract period. Plaintiff contends that the exhibit constitutes double hearsay. therefore, Defendant should not be permitted to present the exhibit at trial. The Court disagrees. "To the extent these images and text are being introduced to show the images and text found on the websites, they are not statements at all—and thus fall outside the ambit of the hearsay rule." Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F.Supp.2d 1146, 1155 (C.D.Cal.2002) (noting that the printouts of the website are admissible pursuant to the best evidence rule.) Moreover, the contents of Polska's website may be considered an admission of a party-opponent, and are not barred by the hearsay rule. See Van Westrienen v. Americontinental Collection Corp., 94 F.Supp.2d 1087, 1109 (D.Or.2000).

*6 Plaintiff then contends that the exhibit has not been properly authenticated.¹ Attached to the exhibits is an affidavit from Ms. Molly Davis, verifying that the Internet Archive Company retrieved copies of the website as it appeared on the dates in question from its electronic archives. Plaintiff labels the Internet Archive an unreliable source and claims that Defendant has not, therefore, met the threshold requirement for authentication.

Federal Rule of Evidence 901 "requires only a prima facie showing of genuineness and leaves it to the jury to decide the true authenticity and probative value of the evidence." *U.S. v. Harvey*, 117 F.3d 1044, 1049 (7th Cir.1997).

Admittedly, the Internet Archive does not fit neatly into any of the non-exhaustive examples listed in Rule 901; the Internet Archive is a relatively new source for archiving websites. Nevertheless, Plaintiff has presented evidence that the Internet Archive is unreliable or biased. And Plaintiff has neither denied that the exhibit represents the contents of its website on the dates in question, nor come forward with its own evidence challenging the veracity of the exhibit. Under these circumstances, the Court is of the opinion that Ms. Davis' affidavit is sufficient to satisfy Rule 901's threshold requirement for admissibility. Plaintiff is free to raise its concerns regarding reliability with the jury.

Finally, Plaintiff asserts that Ms. Davis is an undisclosed expert witness and that her affidavit authenticating the exhibits should be barred. The Court rejects Plaintiff's assertion that Ms. Davis is offering an opinion, expert or otherwise, and rejects Plaintiff's argument. Plaintiff's Fifteenth Motion *in limine* is denied.

In its Sixteenth Motion *in limine*, Plaintiff asks that Defendant be prohibited from introducing any evidence that statements—other than those alleged in its Second Amended Counterclaimare defamatory.

Plaintiff contends that courts in the Northern District employ the precise language requirement in defamation actions. *Vantassell–Matin v. Nelson*, 741 F.Supp. 698, 707–08 (N.D.Ill.1990). The precise language requirement ensures that the opposing party has notice of the words alleged to be defamatory in forming its responsive pleadings. *Id.*

However, at least one court in this district has questioned the propriety of employing the judicially-created precise language rule, given Rule 8's liberal notice pleading requirement. In *Socorro v. IMI Data Search Inc.*, Judge

Kennelly issued a thorough and well reasoned opinion tracing the roots of the precise language rule to nonbinding precedent from the Eighth Circuit. No. 02 C 8120, 2003 WL 1964269, at *3 (N.D.Ill. April 28, 2003). Judge Kennelly further notes that "an allegation is considered 'specific enough' if it permits the defendant to understand the specific nature of the claim and form a responsive pleading." *Id.* citing *Cozzi v. Pepsi–Cola Gen. Bottlers Inc.*, No. 96 C 7228, 1997 WL 312048, at *5 (N.D.Ill. June 6, 1997) (stating that "courts in this district ... have held that the defamatory language need not be quoted verbatim").

*7 For example, in *Harding v. Rosewell*, 22 F.Supp.2d 806, 818 (N.D.III.1998), the court found that once a case proceeds beyond the pleading stage, the appropriate inquiry is whether the opposing party had notice of the defamatory remarks. The court noted that "[t]he defendants, through discovery, have been given all the notice required of the alleged defamatory statements." *Id.*

Similarly, in the case at bar, the pleading stage has long since past; discovery is now closed. While Plaintiff asserts (but does not explain) prejudice, the Court is of the opinion that Plaintiff was given sufficient notice of the alleged defamatory remarks through discovery process. And the "new" remarks that Defendant seeks to rely upon in support of its counterclaim, defamation like the statements identified in Defendant's Second Amended Counterclaim, all arise from the parties' falling out over their attempts to renew their contract. Under these circumstances, the Court finds that it would be inappropriate to bar evidence of the allegedly defamatory statements not specifically identified in Defendant's Second Amended Counterclaim. Plaintiff's Sixteenth Motion in limine is denied.

Plaintiff seeks to bar Defendant from

introducing a redacted email to an unknown recipient from Telewizja's President, B.M. Spanski in its Seventeenth Motion in limine. Plaintiff claims that the document should not be admitted because it has not been authenticated. among other reasons. Defendant counters that Mr. Spanski authenticated the email by identifying it in his deposition. A review of the relevant deposition testimony belies Defendant's assertion. Mr. Spanski acknowledged that the email contained his email address, and little more. He neither recognized the email, nor remembered sending it. Because the document has not been authenticated, Plaintiff's Seventeenth Motion in limine is granted.

II. Defendant's Motions In Limine

Defendant has filed an astounding 38 Motions *in limine*; very few warrant serious discussion. In half of its motions, Defendant is seeking little more than acknowledgment that it has correctly recited the Federal Rules of Evidence. Plaintiff apparently agrees that Defendant has succeeded in this limited regard, stating that it has no objection to Defendant's Motions *in limine* Nos. 1, 2, 6, 8, 10, 14, 15, 16, 17, 20, 21, 23, 24, 25, 26, 27, 29, 33, and 36.

Motion *in limine* No. 34 (which "claims surprise" as to matters, causes of action, theories of recovery, etc. that Plaintiff hasn't specifically identified) seeks to preclude precisely *nothing*, while Motion No. 38 (a catch-all provision referencing all of the "matters listed above") seeks to preclude almost *everything*. Both Motions are denied.

Defendant's Third Motion *in limine* seeks to preclude Plaintiff's counsel and witnesses from referencing any statement of the law, other than that regarding the burden of proof and the basic legal definitions. Plaintiff does not object to the Motion, but asks that it exclude the Seventh

Circuit's holding in *Telewizja Polska USA*, *Inc.* v. *EchoStar Satellite Corp.*, No. 02–4332, 2003 WL 21579968, at *2–3 (7th Cir. Sept.10, 2003).

*8 Plaintiff does not suggest how, precisely, it would like to introduce the Seventh Circuit's opinion into evidence. Of course, it would be inappropriate for a witness to testify as to the contents of the Seventh Circuit's decision. The interpretation of the contract is the province of the court, not the jury; accordingly, the jury does not require assistance from the Seventh Circuit in interpreting and evaluating the scope of the parties' agreement. The Motion is granted.

Defendant's Motions *in limine* Nos. 4, 5, and 18 contend that any reference to prior verdicts, lawsuits, or claims against it is impermissible, pursuant to Federal Rule of Evidence 401 (defining relevant evidence), Rule 402 (stating that relevant evidence is generally admissible), and 403 (noting that relevant evidence should not be admitted if it is unduly prejudicial). Similarly, In Motions 28, 30, 31, and 32, Defendant seeks to exclude evidence of collateral bad acts or character evidence, citing Rule 404.

Plaintiff correctly notes however, that where a movant places its character at issue, evidence of reputation or specific instances of conduct may be admitted to prove character. Fed.R.Evid. 405(a) and (b). A movant may put its character at issue by filing a claim for defamation, "where injury to reputation must be proven." *Johnson v. Pistelli*, No. 95 C 6424, 1996 WL 587554, at *3, n. 5 (N.D.III. Oct.8, 1996).

In this case, Defendant has filed a defamation counterclaim. To the extent that Plaintiff demonstrates at trial that evidence of other claims or lawsuits involving Defendant, or of Defendant's collateral bad acts bears upon its character and reputation, that evidence may be admissible. *See Schafer v. Time, Inc.*, 142 F.3d 1361, 1370 (11th Cir.1998). Because such evidence may be admissible at trial, upon a proper showing by Plaintiff, motions *in limine* Nos. 4, 5, 18, 28, 30, 31, and 32 are denied.

In Motions in limine Nos. 7, 11, 12, and 13, Defendant asserts that evidence of its size, power, net worth, assets, or wealth is irrelevant and, even if relevant, would be unduly prejudicial. See Fed.R.Evid. 402 and 403. In its counterclaims, however, Defendant has alleged that Plaintiff defamed it and otherwise caused it damage by claiming that Defendant is a "monopoly" and has otherwise asserted its powerful market position to bully Plaintiff. Evidence of Defendant's market strength and wealth would likely be relevant in defending against such a claim. To the extent that Defendant places its wealth and/or power at issue, it may open the door to evidence on the issue. Therefore, the motions are denied.

Defendant's Ninth Motion *in limine* seeks to prohibit inquiry into its communications with its attorneys. While privileged communications that have not been waived will remain off limits, Defendant's request captures non-privileged communications with counsel, as well as instances where the privilege has been waived. *See, e.g., C & F Packing Co., Inc. v. IBP, Inc.,* No. 93 C 1601, 1997 WL 619848 (N.D.Ill. Sept.30, 1997). As such, Defendant's Ninth Motion *in limine* is denied.

*9 Defendant also seeks to prevent Plaintiff from commenting on Defendant's failure to produce a witness, if, in fact, Defendant fails to produce a witness at trial. Permitting or prohibiting attorneys from commenting on its opponents failure to call a witness rest soundly within the discretion of the trial judge. *U.S. v. Simpson*, 974 F.2d 845, 848 (7th Cir.1992). Because a ruling on the issue is best reserved for trial, Defendant's Nineteenth Motion *in limine*

is Denied.

Defendant then asks the Court to prevent Plaintiff from introducing new theories of damages, as well as previously undisclosed damage calculations. Plaintiff counters that granting the motion would eliminate the flexibility required to potentially modify its damages calculations to meet the evidence introduced at trial. The Court Defendant's Twenty-second Motion in limine in part, barring Plaintiff from introducing at trial any evidence concerning a source of damages that it has failed to disclose. However, to the extent that Plaintiff must modify its damages calculations in light of the evidence presented or rulings made at trial, the Motion is denied.

Defendant's Thirty-fifth Motion *in limine* seeks to bar any reference to the substance of statements of potential witnesses until trial. The Court notes, however, that traditionally, attorneys have referenced potential witnesses and testimony during opening argument and that granting Defendant's Motion would prevent the parties from doing so. Defendant's Thirty-fifth Motion *in limine*, therefore, is denied.

Finally, Defendant's Thirty-seventh Motion *in limine* requests that Plaintiff be prevented from mentioning that it seeks disgorgement damages from Defendant's profits. Defendant argues that disgorgement is not a valid remedy in a breach of contract action, because the terms of the contract governs the parties' relationship. *See Conseco Group Risk Mgmt. Co. v. Ahrens Fin. Sys. Inc.*, No. 00 C 5467, 2001 WL 219627, at *6 (N.D.Ill. Mar.6, 2001).

Plaintiff does not dispute Defendant's assertion, but notes that it brought the unjust enrichment claim—which would give rise to a disgorgement remedy -in the alternative to the breach of contract claim. As Judge Guzman has not dismissed Plaintiff's unjust enrichment claim, it

would be inappropriate at this stage of the proceedings to preclude Plaintiff from mentioning disgorgement damages. Therefore, Defendant's Motion *in limine* 37 is denied.

With respect to Defendant's Motions, the Court grants Motions *in Limine* Nos. 1, 2, 3, 6, 8, 10, 14, 15, 16, 17, 20, 21, 23, 24, 25, 26, 27, 29, 33, and 36, as Plaintiff has not objected to these Motions. The Court denies Defendant's Motions *in Limine* Nos. 4, 5, 7, 9, 11, 12, 13, 18, 19, 28, 30, 31, 32, 35, 37 and 38.

CONCLUSION

As set forth above, the Court grants Plaintiff's Seventeenth Motion *in limine*, and grants in part Plaintiff's Sixth and Tenth Motions *in limine*. The Court denies Plaintiff's remaining Motions *in limine*.

All Citations

Not Reported in F.Supp.2d, 2004 WL 2367740, 65 Fed. R. Evid. Serv. 673

Footnotes

Coincidentally, Plaintiff claims that it is unable to access any images of its website during the time in question.

Versata Software, Inc. v. Internet Brands, Inc., 2012 WL 2595275 (E.D. Tex. July 5, 2012)

- Plaintiff (a business) sued Defendant for tortious interference in a prospective business relationship with Chrysler.
- At issue was an email sent by Mr. Biwer (from Plaintiff), to colleagues, stating that Mr. Jacops (also from Plaintiff) told him about a lunch meeting with Mr. Sullivan (from Chrysler) during which Mr. Sullivan relayed information that could help Versata's claims against Defendant.
 - Issue: Given the multiple levels of hearsay, does this email fall under any of the hearsay exceptions (i.e., business records, present sense impression, or state of mind)?

Holding: No. The email does not satisfy the requirements of the business records exception because it was not sent as part of a routine business practice. The delay between the lunch meeting and Mr. Jacops's report to Mr. Biwer was too long for the present sense impression exception to apply, as was the delay between Mr. Jacops's report and Mr. Biwer sending the email. Mr. Sullivan's statement was not relevant to his state of mind, and his state of mind was not relevant to the case.

• Commentary: One commentator has suggested that the considerations regarding the present sense impression and state of mind exceptions applied to the email in this case would apply equally in cases involving newer forms of communication (e.g., Facebook posts, tweets). See

http://apps.americanbar.org/litigation/committees/trialevidence/articles/summer2013-0813-social-media-federal-rules-evidence.html.

Defendants.

Civil Action No. 2:08–cv–313–WCB. | July 5, 2012.

Attorneys and Law Firms

Samuel Franklin Baxter, McKool Smith, Marshall, TX, Demetrios Anaipakos, Kinan Hab Romman, Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing P.C., Houston, TX, Joel Lance Thollander, John Franklin Garvish, II, John Michael Shumaker, Kevin M. Kneupper, Kristina Scurry Baehr, Laurie Lavigna Fitzgerald, Leah Bhimani Buratti, Scott Lamar Cole, Victoria Wicken, McKool Smith, PC, Austin, TX, for Plaintiffs.

Michael P. Adams, Andrew John Schumacher, Brian Lawrence King, James Gene Ruiz, Winstead Sechrest & Minick, Austin, TX, David Bricker, Patrick A. Fraioli, Jr., Moldo Davidson Fraioli Seror & Sestanovich, Los Angeles, CA, Harry Lee Gillam, Jr., Melissa Richards Smith, Gillam & Smith, LLP, Marshall, TX, Jeffrey Allen Tinker, Winstead PC, Dallas, TX, for Defendants.

2012 WL 2595275
Only the Westlaw citation is currently available.
United States District Court,
E.D. Texas,
Marshall Division.

VERSATA SOFTWARE, INC., f/k/a Trilogy Software, Inc.; and Versata Development Group, Inc., f/k/a Trilogy Development Group, Inc., Plaintiffs,

v.
INTERNET BRANDS, INC., f/k/a
Carsdirect.com, Inc., Autodata Solutions
Company, and Autodata Solutions, Inc.,

MEMORANDUM AND ORDER

WILLIAM C. BRYSON, Circuit Judge.

*1 In the course of trial held during the week of June 11th, 2012, the Court excluded a document that the plaintiffs sought to have admitted into evidence. The Court excluded the document on hearsay grounds and under Fed.R.Evid. 403. This Order describes the background against which the issue arose and sets forth the legal

grounds for the Court's ruling.

I. Background

This evidentiary issue arose during litigation between plaintiffs (collectively "Versata") and defendants (collectively "Autodata"), both of which are providers of website software and services to automobile manufacturers. Among Versata's claims in the litigation were claims accusing Autodata of breach of contract and tortious interference with a prospective business relationship by misrepresenting to Chrysler Corporation the scope of a license that Autodata had from Versata.

At trial, Versata sought to introduce into evidence PX 310, an e-mail sent by Versata employee Mike Biwer to several other Versata employees. The e-mail was sent at 5:59 pm on Wednesday, June 25, 2008. The subject line reads, "Update from Randy on his meetings in Detroit today." The text reads, in pertinent part, as follows (ellipses in original):

Just a quick update from my conversation with Randy this afternoon....he is going to send out more complete notes later today or tomorrow....

- 1. Chuck Sullivan—lunch
- -cordial meeting
- -Chuck likes Versata ... inherited decision from Chrysler to move in a different direction ... i.e., AutoData (AD) ... the ship has set sail
- -feedback he has gotten is that there is little to no IP risk given the approach they are taken
 - >Chuck was told that AD has a license to our broader portfolio (not true)
 - >Randy does not feel Chuck fully understands the complexity of the issue or perhaps is not worried given what he's been

told internally

- -this one is going to take several cycles to resolve
- -we need to work with Lance on developing options and next steps

More to follow ...

Mike

The substance of the luncheon meeting between Mr. Jacops ("Randy") of Versata and Mr. Sullivan ("Chuck") of Chrysler was an important issue during the trial. Mr. Jacops testified at trial regarding the meeting, and Mr. Sullivan testified by deposition about the same meeting. The contents of the Biwer e-mail, and in particular the line stating, "Chuck was told that AD has a license to our broader portfolio (not true)," were therefore potentially significant. The problem is that the e-mail consisted of hearsay, several layers deep.

First, the e-mail was an out-of-court statement by its author, Mr. Biwer. It is therefore hearsay to the extent it was offered to prove the truth of any of the assertions contained within it. Fed.R.Evid. 801(c). Second, Mr. Biwer's e-mail purported to report statements made to him earlier in the day by Mr. Jacops. Mr. Jacops's statements constitute a second layer of hearsay. Third, Mr. Biwer reported in the e-mail that Mr. Jacops had passed along statements made by Mr. Sullivan of Chrysler. The statements purportedly made by Mr. Sullivan regarding Autodata's rights with regard to Versata's intellectual property constitute a third layer of hearsay. Fourth, Mr. Biwer reported that Mr. Jacops said that Mr. Sullivan "was told" that Autodata had a license to Versata's "portfolio." That statement is supplemented in the e-mail by the parenthetical comment, "not true." The statement of the unknown declarant who purportedly told Mr. Sullivan that Autodata had a license to Versata's portfolio constitutes a

fourth level of hearsay. It is not clear whether the fourth declarant was the last in the chain of declarants, as the statement that Mr. Sullivan "was told" that Autodata had a license to Versata's portfolio does not make clear whether that statement came from someone at Autodata or someone at Chrysler who was passing on information obtained, directly or indirectly, from Autodata. The use of the passive voice ("was told") leaves that issue unclear. Finally, as to the parenthetical comment, it is entirely unclear who the declarant was—Mr. Biwer, Mr. Jacops, Mr. Sullivan, or someone else.

*2 When the issue of the admissibility of PX 310 first arose prior to trial, Versata argued that the e-mail was admissible either as non-hearsay, supply context for other statements purportedly made at the luncheon meeting between Mr. Jacops and Mr. Sullivan, or under the hearsay exception for statements of present sense impression, Fed.R.Evid. 803(1). At that time, the Court ruled that the e-mail was not admissible under the "present sense impression" exception; however, the Court ruled that it could be admissible for non-hearsay purposes if its admission were accompanied by a limiting instruction advising the jury that the e-mail could not be considered for the truth of any assertions contained within it. As an example of the possible relevance of the document for nonhearsay purposes, the reference to the luncheon meeting between Mr. Jacops and Mr. Sullivan in the e-mail, which was dated June 25, 2008, helped identify the date of that meeting. Accordingly, when the e-mail was first offered during trial, the court admitted it subject to a limiting instruction directing the jury not to consider the e-mail for the truth of any of its contents.

Later in the trial, it became clear that the relevance of the e-mail for non-hearsay purposes was marginal and the issue of what Autodata told Chrysler about its rights vis-à-vis

Versata's intellectual property was important. The Court therefore reconsidered its decision to admit the e-mail subject to a limiting instruction and instead ruled the e-mail inadmissible for all purposes. The Court based its ruling on Fed.R.Evid. 403, finding that the risk of prejudice and the difficulty the jury would likely have in following the Court's limiting instruction under the circumstances outweighed the minimal relevance of the e-mail for any legitimate non-hearsay use at trial. See Nash v. United States, 54 F.2d 1006, 1007 (2d Cir.1932) (L.Hand, J.) (sometimes a limiting instruction amounts to a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else").

When the Court decided to exclude the e-mail, Versata changed its position with regard to the admission of the e-mail for non-hearsay purposes only and argued that the e-mail should be admitted without restriction. After giving Versata an opportunity to make an evidentiary proffer and hearing argument on the issue, the Court held that PX 310 was inadmissible as hearsay. At the close of all the evidence, the Court advised the jury that although PX 310 had previously been admitted subject to a limiting instruction, that exhibit was now excluded and was not to be considered by the jury for any purpose.

II. Discussion

The critical statement in the Biwer e-mail ("Chuck was told that AD has a license to our broader portfolio (not true)") presents multiple layers of hearsay. At trial, Versata argued that the e-mail was admissible either as non-hearsay or based on the sequential application of several hearsay exceptions, and it made a proffer and offered legal argument in support of admissibility. The Court disagreed and excluded the e-mail. Because the issue arose at a point during trial when there was no opportunity for

the Court to set forth the grounds for its ruling in detail, the Court stated at the time that it would likely issue an order on this issue to provide a fuller explanation of its ruling. This is that order.

A. Non-Hearsay

*3 Versata argued at trial that the Biwer e-mail was admissible to provide context for statements made at the luncheon meeting. To the extent context was important, the e-mail was not necessary to supply the context in which various statements may have been made at the luncheon meeting, as both parties to the meeting testified at trial—Mr. Jacops through live testimony and Mr. Sullivan by way of deposition. Moreover, the Court stated that if the e-mail were admitted for non-hearsay purposes, it would have to be accompanied by a limiting instruction, a proposition with which Versata agreed. Trial Tr. (June 13, AM session) 165. Yet the Court had previously concluded that the relevance of the email for non-hearsay purposes was outweighed by the risk of prejudice and confusion that would result from the admission of the e-mail subject to a limiting instruction. The Court reaffirmed that view during Versata's argument. *Id.* at 165–66. The Court continues to be of the view that the non-hearsay purposes for which Versata offered the e-mail were swamped in significance by the hearsay aspects of the e-mail and that it was proper to exclude the e-mail from evidence even if it had been accompanied by a limiting instruction directing the jury to use it only for non-hearsay purposes.

B. Hearsay Exceptions

Versata argued that various hearsay exceptions would apply to the e-mail, including the "business records" exception, Fed.R.Evid. 803(6), and the "present sense impression" exception, Fed.R.Evid. 803(1). The Court and

counsel for Versata also discussed the exception for "then existing mental, emotional, or physical condition," Fed.R.Evid. 803(3).

None of those exceptions—separately or in conjunction—provides a sufficient platform for the admission of the Biwer e-mail. First, the email was not shown to be a record of the sort that qualifies for admission under the business records exception, as it was not prepared and retained as part of a routine recordkeeping system, but was simply an example of an occasional communication among Versata employees regarding events of interest affecting the company. Second, even if Mr. Biwer's email satisfied the formal requirements of the business records exception, Mr. Jacops's statements to Mr. Biwer that were reported in the e-mail do not qualify for admission under the present sense impression exception, as the critical portion of his statement to Mr. Biwer was not shown to have been made during the occurrence of the event reported or immediately thereafter. Third, even if Mr. Jacops's statements were admissible under the present sense impression exception, Versata has pointed to no convincing reason to conclude that Mr. Sullivan's statements contained in the e-mail would be admissible, either under that exception or any other.

The following is a more detailed discussion of each of Versata's proposed theories of admissibility.

1. Business Records

Versata argued at trial that the Biwer e-mail was admissible as a record of regularly conducted business activity under Rule 803(6). The Fifth Circuit has characterized that exception to the hearsay rule as requiring the following:

*4 (a) That the document have been made "at or near" the time of the matters recorded

therein; (b) that the document have been prepared by, or from information transmitted by a person "with knowledge of the matters recorded"; (c) that the person or persons who prepared the document have been engaged in preparing it, in some undertaking, enterprise or business which can fairly be termed a "regularly conducted business activity"; (d) that it have been the "regular practice" of that business activity to make documents of that nature; and (e) that the documents have been retained and kept in the course of that or some other regularly conducted business activity.

Wilander v. McDermott Int'l, Inc., 887 F.2d 88, 91 (5th Cir.1989), aff'd, 498 U.S. 337, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991); see also United States v. Ned, 637 F.3d 562, 569 (5th Cir.2011).

The reliability of business records—and the reason they are excluded from hearsay—"is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." Fed.R.Evid. 803(6) advisory committee's note; see also 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 803.08[2] (Joseph M. McLaughlin 2d ed. 1997) ("Memoranda that are casual, isolated, or unique do not qualify as business records.").

Tracing the business records exception back to its origins, Wigmore emphasized the importance of the requirement that the record in question be made as part of a "habit and system of making such a record with regularity." 5 John Henry Wigmore, *Evidence in Trials at Common Law* § 1522, at 442 (Chadbourn rev.1974). He explained that the entry must be "part of a series of entries or reports, not a casual or isolated one.... [A] memorandum casually made, would not answer this requirement." *Id.* § 1525, at 446. Likewise, the Supreme Court in its classic

business records case, Palmer v. Hoffman, 318 U.S. 109, 113-14, 63 S.Ct. 477, 87 L.Ed. 645 (1943), explained that the critical element in making particular entries eligible for admission whether the entries were "made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls" for the business, such as "payrolls, accounts receivable, accounts payable, bills of lading and the like." As the Fifth Circuit put it, the rationale for the business records exception "rests on the assumption that business records are reliable because they are created on a dayto-day basis and '[t]he very regularity and continuity of the records are calculated to train the recordkeeper in habits of precision." "Rock v. Huffco Gas & Oil Co., 922 F.2d 272, 279 (5th Cir.1991), quoting McCormick on Evidence § 306 at 872 (3d ed.1984).

Applying those standards, the Court found at trial that Mr. Biwer's e-mail was not a regularly kept record within the meaning of the business records exception and thus lacked the features courts have identified as giving business records the reliability necessary to render them admissible against a hearsay objection. The Court reaffirms that finding now and concludes, for the following reasons, that the Biwer e-mail was not admissible under the business records exception to the hearsay rule.

*5 1. First, Versata has failed to show that the Biwer e-mail was made and kept in the course of a regularly conducted business and as a regular practice of the business. To be sure, in the course of Versata's proffer in support of the admission of PX 310 Mr. Jacops testified that communication via e-mail was a "regular business practice" at Versata and that one of the responsibilities of Versata employees was to "regularly send e-mails around that would recount ... meetings and conversations." Trial Tr. (June 13, AM session) 155:21–156:16. He

also testified, however, that such e-mail updates were sent only "if there was something substantive which you'd want to communicate to the team, you would do it at the end of the day when you had time or wrapping things up." Trial Tr. (June 13, PM session) 14:12–24. While he testified that e-mails were used "to keep the team informed" as to matters of concern to the company, and "so that we would remember what we talked about and understood," Trial Tr. (June 13, AM session) 156:8–16, he did not testify that the e-mails were retained as company records to be consulted later and relied upon for purposes of company operations.

The essence of Mr. Jacops's testimony was that e-mails reporting on events pertinent to the business would be sent at a time convenient to the sender if the sender regarded the subject matter of the e-mail worthy communicating to others. That evidence reflects the use of internal communications information-sharing purposes based on instances of perceived need and convenience, not a system for preparing and retaining business records as a regular and routine practice. In that regard, Versata failed to show that documents such as Mr. Biwer's e-mail were prepared as a matter of business routine as opposed to sporadically, subject to the judgment of the maker of the document. See Wilander, 887 F.2d at 92 (concluding that hearsay statement should not have been admitted as a business record when "there was no showing that the document was kept in the course of some regularly conducted business activity or that it was the regular practice of the business to make such reports"); United States v. Robinson, 700 F.2d 205, 209–10 (5th Cir.1983) (notes of meetings were not admissible under Rule 803(6) because proponent never established that "it was the regular practice of that business activity" to have the notes made); see also United States v. Ramsey, 785 F.2d 184, 192 (7th Cir.1986) ("Occasional desk calendars, in which entries may or may not appear at the whim of the writer, do not have the sort of regularity that supports a reliable inference.").

2. A further problem with Versata's business records theory regarding the Biwer e-mail is that while Mr. Jacops testified that e-mails were created in the ordinary course of Versata's business, he did not testify that e-mails were routinely retained so as to be available for later use. That omission is important. The Fifth Circuit has emphasized the importance, for purposes of the business records exception, of showing that the records in question were "retained and kept in the course of ... regularly conducted business activity." Wilander, F.2d at 91; see United States v. Holladay, 566 F.2d 1018, 1020 (5th Cir.1978) (holding that notebooks were admissible upon showing that they were part of a bookkeeping system that was "continuously maintained" by defendant's business); United States v. Jones, 554 F.2d 251, 252 (5th Cir.1977) (record must be "made and preserved in the regular course of business"). In fact, the Fifth Circuit has noted that the fact that particular ledgers were destroyed at the end of each week might by itself defeat a showing that the ledgers were kept "in the course of a regularly conducted business activity." United States v. Wells, 262 F.3d 455, 460 n. 3 (5th Cir.2001). See also id. at 462 n. 8 (Rule 803(6) requires that a record be "made pursuant to established procedures for the routine and timely making and preserving of business records") (emphasis added); Rambus, Inc. v. Infineon Techs. AG, 348 F.Supp.2d 698, 705 (E.D.Va.2004) (business records exception requires that it be the regular practice of the business "to make and keep the record at issue"; declaration in support of admission of e-mail evidence as a business record "must show that the proffered record was made and kept as a regular practice by the business activity from which the document comes") (emphasis added).

*6 The careful analysis by Judge Rosenthal in *Canatxx Gas Storage Ltd. v. Silverhawk Capital Partners, LLC,* No. H–6–1330, 2008 WL 1999234 (S.D.Tex. May 8, 2008), makes this point clear. In that case, which involved a question as to the admissibility of an e-mail under the business records exception, the court explained that the proponent of an email

made by an employee about a business matter [under Rule 803(6)] must show that the employer imposed a business duty to make and maintain record. such a Courts examine whether it was the business duty of an employee to make and maintain emails as part of his job duties and whether the employee routinely sent or received and maintained the emails.

Id. at *12 (emphasis added). Judge Rosenthal then cited with approval three other cases in which the admissibility of emails under the business records exception was discussed. In the first, DirectTV, Inc. v. Murray, 307 F.Supp.2d 764 (D.S.C.2004), Judge Rosenthal characterized the ruling of the court as holding that sales records contained in emails were admissible "when the sales orders were regularly received by email and the emails were retained as records of each order" (emphasis added). In the second, New York v. Microsoft Corp., No. Civ A. 98-1233, 2002 WL 649951 (D.D.C. Apr. 12, 2002), she characterized the court's ruling as declining to admit e-mails under the business records exception because "there was a 'complete lack of information regarding the practice of composition and maintenance of' the emails" (emphasis added). In the third, United States v. Ferber, 966 F.Supp. 90. 98 (D.Mass.1997), characterized the court's decision as holding that in order for an e-mail to be admissible under Rule 803(6), "there must be some evidence of a business duty to make and regularly maintain records of this type"; she noted that the court in that case excluded the proffered e-mails because, "while it may have been [an employee's] routine business practice to make such records, there was no sufficient evidence that [the employer] required such records to be maintained" (emphasis added).

In this case, Versata adduced evidence that Mr. Biwer prepared e-mails to update others within the company, but it did not introduce any evidence that he or the company routinely retained copies of those e-mails for later consultation. In fact, the intrinsic evidence from the Biwer e-mail tends to rebut any contention that the e-mail was part of a system of regularly maintained business records. The text of the e-mail strongly suggests that it was not intended to become a permanent record of the luncheon meeting, as Mr. Biwer wrote that the e-mail was "[j]ust a quick update on my conversation with Randy this afternoon he is going to send out more complete notes later today or tomorrow." In sum, Versata has failed to satisfy its burden of showing that the Biwer e-mail was one of a series of e-mails that were routinely "made and maintained in the normal course" of Versata's business. Canatxx, 2008 WL 1999234, at *13.

*7 Versata argued at trial that in an age of everreliance increasing on electronic communication, the definition of business records must be broadened to encompass emails such as the one in question. The issue, however, is not the medium used to create the record, but the practice and process of the business in preparing the records in question. If the record—regardless of form—is made with regularity as part of the business's conduct of its affairs, it is regarded as more likely that the record will be accurate and complete, as the business's operations may depend on such

records being maintained accurately. That rationale applies with less force to occasional communications among representatives of the business. In that setting, there is no special degree of reliability that is associated with the record—beyond the usual expectation that people will be honest and accurate in their business-related communications with others.

If occasional communications among employees of a business that relate to the operation of the business were to qualify as business records for purposes of Rule 803(6), that would convert the exception for "business records" into an exception for "business communications" and would open the door to a vast array of communications within a business, contrary to the conventional understanding of the business records exception. See Monotype Corp. PLC v. Int'l Typeface Corp., 43 F.3d 443, 450 (9th Cir.1994) (distinguishing between computer printouts of bookkeeping records and e-mails; "E-mail is far less of a systematic business activity than a monthly inventory printout. Email is an ongoing electronic message and retrieval system whereas an electronic inventory recording system is a regular, systematic function of a bookkeeper prepared in the course of business.").

3. Of course, even if the Biwer e-mail had satisfied the formal requirements of the business records exception, that would not render it admissible without more. As a general rule, the business records exception requires a showing that "each actor in the chain of information is under a business duty or compulsion to provide accurate information." United **States** McIntyre, 997 F.2d 687, 699 (10th Cir.1993); Fed.R.Evid. 803(6) see also advisory committee's note ("If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail."); 2 Kenneth S. Broun, *McCormick on Evidence* § 290 (6th ed.2006).

The Fifth Circuit has held that a document that otherwise qualifies as a business record but contains hearsay statements not within the personal knowledge of the maker of the record may be admitted if the hearsay statement or statements contained within the record are subject to other hearsay exceptions. Wilson v. Zapata Off-Shore Co., 939 F.2d 260, 271 (5th Cir.1991) ("[I]f the source of the information is an outsider, ... Rule 803(6) does not, by itself, permit the admission of the business record. The outsider's statement must fall within another hearsay exception to be admissible because it does not have the presumption of accuracy that statements made during the regular course of business have."); accord United States v. Patrick, 959 F.2d 991, 1000 (D.C.Cir.1992). In this case, even assuming that Mr. Biwer was acting pursuant to a business-imposed reporting duty, there was no showing that any of the other declarants were subject to a similar duty. And, as is discussed in the following sections, there was no other valid basis for overcoming the hearsay problems with those declarants' statements. The Biwer e-mail is therefore inadmissible as containing multiple hearsay. even if it otherwise qualifies as a business record.

*8 4. Finally, Rule 803(6) provides that even if a document satisfies the formal requirements of the rule, it may not be admitted if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Certain factors surrounding the preparation of the Biwer e-mail cast further doubt on the trustworthiness of that document as an accurate record of what transpired at the luncheon meeting. First, Mr. Jacops testified that he and Mr. Sullivan did not discuss Autodata by name, see Trial Tr. (June 11, PM session) 48:13–14

("[W]e didn't specifically discuss AutoData"); see also Trial Tr. (June 13, AM session) 159:7-12 ("Q: Now, at that meeting, you testified earlier names were never mentioned between [you] and ... Chuck; is that correct? ... A: Yes."). Yet the e-mail reports Mr. Sullivan as having said that he "was told that AD has a license to our broader portfolio." The insertion of Autodata into the statement constitutes a striking departure from Mr. Jacops's characterization of the Sullivan meeting in his testimony and gives rise to doubt as to how accurately Mr. Biwer reported the statements that were passed on to him. Second, the addition of the "not true" parenthetical indicates that the e-mail did more than merely recount the Sullivan; it conversation with Mr. contained editorial comments of either Mr. Jacops or Mr. Biwer. Third, as noted, the e-mail indicated that Mr. Jacops was "going to send out more complete notes later today or tomorrow." That statement suggests that the account of the lunch in the e-mail was necessarily abridged and incomplete. All of those factors indicate that Mr. Biwer's report of the meeting between Mr. Jacops and Mr. Sullivan may have been essentially a "rough translation" accompanied by editorial commentary, rather than a faithful account of the facts of the event.

2. Present Sense Impression

Versata seeks to address the problem of the second declarant, Mr. Jacops, by invoking Fed.R.Evid. 803(1), the exception for statements setting forth the declarant's "present sense impression." Rule 803(1) provides an exception to the hearsay rule for "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." Fed.R.Evid. 803(1). "The justification for this exception hearsay relies on the contemporaneousness of the event under consideration and the statement describing that event. Because the two occur almost simultaneously, there is almost no 'likelihood of [a] deliberate or conscious misrepresentation.' "
Rock, 922 F.2d at 280, quoting Fed.R.Evid.
803(1) advisory committee's note; see also
United States v. Peacock, 654 F.2d 339, 350
(5th Cir.1981) (statement that was otherwise hearsay was properly admitted because it was immediately repeated to a third party and "[t]here was no time for [the declarant] to consciously manipulate the truth").

Mr. Jacops testified that he called Mr. Biwer within "a matter of minutes" after the conclusion of the luncheon meeting. See Trial Tr. (June 13, AM session) 155:15. That by itself, however, does not establish that Mr. Sullivan's statement, which was made at some point during the luncheon, was reported to Mr. Biwer "while or immediately after the declarant perceived it," as required by the rule. Mr. Jacops did not say at what point in the course of the lunch Mr. Sullivan made the statement about Autodata's alleged license rights. But his testimony makes clear that the period of delay between the statement and Mr. Jacops's report to Mr. Biwer was a combination of the time it took to complete the luncheon after the "license rights" comment, plus the "matter of minutes" that Mr. Jacops said went by after the conclusion of the luncheon and before he reported the events of the meeting to Mr. Biwer. The cases on which Versata relied at trial to establish the contemporaneity of the events and the declarant's present sense impression of those events, United States v. Portsmouth Paving Co., 694 F.2d 312, 323 (4th Cir.1982), and *United* States v. Danford, 435 F.3d 682, 687 (7th Cir.2005), both involved a declarant's reporting of the contents of a telephone conversation immediately upon its conclusion Portsmouth, "no more than a few seconds" after the conversation ended; in Danford, "less than a minute after the conversation ended). The Fifth Circuit, in a case involving Rule 803(1), agreed with the District of Columbia Circuit that a

delay of 15 to 45 minutes in reporting an incident does not qualify reporting the incident "immediately" after it occurred. See United States v. Cain, 587 F.2d 678, 681 (5th Cir.1979), citing Hilyer v. Howat Concrete Co., 578 F.2d 422, 426 n. 7 (D.C.Cir.1978) ("an outof-court statement made at least fifteen minutes after the event it describes is not admissible unless the declarant was still in a state of excitement resulting from the event [which would render the statement admissible under the 'excited utterance' exception to the hearsay rule, Fed.R.Evid. 803(2)]"). The rationale for the requirement of contemporaneity is that the "substantial contemporaneity of event and statement negate the likelihood of deliberate or misrepresentation." conscious Fed.R.Evid. 803(1) advisory committee's note. When a statement is made while the declarant is observing the event being perceived or immediately thereafter, the declarant will have no time for reflection. McCormick emphasizes the requirement that the statement be made "immediately" after the event being reported, noting that "[w]hile principle might seem to call for a limitation to exact contemporaneity, some allowance must be made for the time needed for translating observation into speech. Thus, the appropriate inquiry is whether sufficient time elapsed to have permitted reflective thought." McCormick on Evidence § 271, at 254.

*9 In this case, it seems highly likely that the period of time between when the statement was made during the luncheon meeting and when Mr. Jacops reported the statement to Mr. Biwer after the conclusion of the meeting was sufficient for reflection; it was certainly longer than the period needed "for translating observation into speech." In any event, the burden of showing the elements of admissibility for a statement under the present sense impression exception, like the burden on evidentiary issues generally, is on the proponent of the evidence. See Bemis v. Edwards, 45 F.3d

1369, 1373 (9th Cir.1995); Miller v. Keating, 754 F.2d 507, 511 (3d Cir.1985); see also Bourjaily v. United States, 483 U.S. 171, 176, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987); United States v. Two Shields, 497 F.3d 789, 793 (8th Cir.2007); Lewis v. CITGO Petroleum Corp., 561 F.3d 698, 705 (7th Cir.2009). Versata's evidence of contemporaneity, limited to Mr. Jacops's testimony that he called Mr. Biwer within "a matter of minutes" after the conclusion of his luncheon with Mr. Sullivan, did not satisfy its burden of establishing that Mr. Jacops's statements to Mr. Biwer were made at the time of Mr. Sullivan's comments or "immediately thereafter," as that term is used in Rule 803(1).

While all this may appear to have a hypertechnical flavor to it, the passage of time between event and statement is vitally important to the applicability of the present sense impression exception. "The idea of immediacy lies at the heart of the exception, thus, the time requirement underlying the exception is strict because it is the factor that assures trustworthiness." See United States v. Green, 556 F.3d 151, 155 (3d Cir.2009) (citations and internal quotations omitted). In that context, the imprecision of Versata's evidence as to the period of delay between Mr. Sullivan's statement during the luncheon and Mr. Jacops's report of that statement in his post-luncheon telephone call to Mr. Biwer is fatal.

To the extent that Versata argues that the present sense impression exception applies to Mr. Biwer's declarations,² the evidence indicates that Mr. Biwer's e-mail was not prepared until several hours after his conversation with Mr. Jacops. Mr. Jacops and Mr. Sullivan met for lunch, but Mr. Biwer's e-mail was sent at approximately 6 p.m. that evening, presumably long after the luncheon meeting had ended. That span of time destroys the contemporaneousness that is required to

make the statements fall under the exception in Rule 803(1). See Rock, 922 F.2d at 280 (affirming trial court's inadmissibility ruling for accident reports that were "not filed immediately following [the] alleged accident, but only after two days had passed"); Cain, 587 F.2d at 681; cf. First State Bank of Denton v. Md. Cas. Co., 918 F.2d 38, 42 (5th Cir.1990) (statements to dispatcher about whether a person was at home satisfied Rule 803(1) when made "virtually on the heels of the discovery that [that person] was not at home"); Canatxx, 2008 WL 1999234, at *14 (e-mail admissible as present sense impression where writer "stated in his affidavit that the email was sent '[a]s soon as I finished my conversation with Blackmon," and "[t]he email itself states that Blackmon had 'just called' ").

3. State of Mind

*10 Versata faces an even bigger hurdle in attempting to show why Mr. Sullivan's statements are not excludable as hearsay. Mr. Biwer's e-mail reports that Mr. Sullivan told Mr. Jacops that he (Mr. Sullivan) had been told that Autodata "has a license to [Versata's] broader portfolio." To the extent the statement was offered to show the truth of the matter asserted-i.e., that Mr. Sullivan had been told that Autodata had a broad license to Versata's intellectual property—the statement was plainly hearsay. Versata made clear at trial that it wished to use the statement for that purpose. As statement such. Mr. Sullivan's inadmissible, as none of the hearsay exceptions apply. The statement was obviously not a business record, it was not a statement of present sense impression by Mr. Sullivan, and it was not a party admission, see Fed.R.Evid. 801(d)(2), because Chrysler (Mr. Sullivan's employer) was not a party to the lawsuit.³

To the extent that Versata argues that Mr. Sullivan's statement was admissible under

Fed.R.Evid. 803(3) as a statement reflecting Mr. Sullivan's state of mind, the statement clearly fails to satisfy the requirements of that rule. Rule 803(3) provides an exception to the hearsay rule for a "statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional ... condition (such as mental feeling ...)." Before a statement which would otherwise be hearsay may be admitted under Rule 803(3) "to show the declarant's then existing state of mind, the declarant's state of mind must be a relevant issue in the case." *Rock*, 922 F.2d at 279, quoting *Prather v. Prather*, 650 F.2d 88, 90 (5th Cir.1981).

Even if Mr. Sullivan's purported statement that he had been told that Autodata had a license to Versata's portfolio reflected something about Mr. Sullivan's state of mind, his state of mind was not a relevant issue in the case. Versata was seeking to use the statement to prove that Autodata had made a claim regarding its rights to use Versata's technology, not to show something about Mr. Sullivan's mental state. Moreover, even if the statement could be regarded as relevant to Mr. Sullivan's state of mind and even if Mr. Sullivan's state of mind on that matter were somehow material, the e-mail would have to have been admitted subject to a limiting instruction "to insure that assertions as to particular facts contained in the statement will be considered by the jury solely as bearing upon the declarant's state of mind" and not for the truth of the factual matter asserted. 30B Michael H. Graham, Federal Practice & Procedure § 7044, at 438 (2006). But, as indicated earlier, the Court did not (and does not) regard the limiting instruction as adequate under the circumstances of this case and therefore excluded the evidence under Rule 403.

The hearsay rules bar parties from using the state of mind exception as a means of introducing statements of memory or belief in order to prove the matter remembered or believed. In fact, the state of mind exception in the Federal Rules of Evidence contains an express limitation designed to guard against the use of that exception as a vehicle for introducing evidence for such purposes. The rule provides (with one exception not applicable here) that the hearsay exception for statements reflecting the declarant's state of mind does not include "a statement of memory or belief to prove the fact remembered or believed." Fed.R.Evid. 803(3). As the advisory committee notes confirm, that provision was added because it was regarded as necessary to avoid "the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind." Fed.R.Evid. 803(3) advisory committee's note. That proposition has been a mainstay of hearsay law for years and has been applied faithfully since the enactment of the Federal Rules of Evidence. See Shepard v. United States, 290 U.S. 96, 105-06, 54 S.Ct. 22, 78 L.Ed. 196 (1933); United States v. Liu, 960 F.2d 449, 452 (5th Cir.1992); Prather, 650 F.2d at 90; United States v. Cohen, 631 F.2d 1223, 1225 (5th Cir.1980); United States v. Samaniego, 345 F.3d 1280, 1283 (11th Cir.2003).

*11 Mr. Sullivan's declaration therefore does not fall within any hearsay exception; the hearsay nature of that declaration is sufficient by itself to render PX 310 inadmissible.

C. The Timing of the Court's Ruling

The Court informed the jury of its decision to exclude the e-mail from evidence at the close of all the evidence in the trial. *See* Trial Tr. (June 15, AM session) 144:4–145:3. After the jury left the courtroom, Versata objected to the Court's instruction, arguing that the timing of the instruction was prejudicial. In part, Versata's

objection stemmed from concern that Autodata might comment on the withdrawal of the e-mail from evidence as reflecting adversely on Versata. The Court, however, stated that it would not allow Autodata's counsel to comment on that matter, and Autodata faithfully complied. In part, Versata objected to the timing of the Court's informing the jury that the exhibit had been excluded, coming as it did at the close of the evidence at trial and only a few hours before the jury retired for deliberations.

The reason the Court chose that time to inform the jury that PX 310 had been excluded was to avoid possible prejudice to one side or the other. If the Court had informed the jury during or at the end of the plaintiff's case that the exhibit had been excluded, it is possible that the jury would have inferred that some important element of the plaintiff's case had been struck from the record. Likewise, if the Court had given its explanation to the jury during or at the end of the defense case, the jury might have inferred that the ruling reflected adversely on the defense. Advising the jury about the disposition of PX 310 as part of the housekeeping matters that came at the close of the evidence and before the jury's luncheon break on the last day of trial seemed to be the neutral time. Following objection, the Court invited counsel to propose a curative instruction, but counsel declined. The Court concludes that the manner in which the jury was informed that PX 310 had been withdrawn from evidence was not prejudicial to Versata.

For all of the foregoing reasons, the Court confirms its prior ruling that PX 310 was properly excluded at trial.

All Citations

Not Reported in F.Supp.2d, 2012 WL 2595275,

88 Fed. R. Evid. Serv. 1163

Footnotes

be admitted as non-hearsay to show the context of meeting.

- The fact that a copy of the Biwer e-mail was produced for with purpose close the postablish that mail be add such e-mails were routinely retained for consultation and user operated as first the fact that a party may be after to retrieve the fact that a party may be after to retrieve the fact that a party may be after to retrieve the fact that a party may be after to retrieve the fact that a party may be after to retrieve the fact that a party may be after to retrieve the fact that a party may be after to retrieve the fact that a party may be after to retrieve the fact that the computer system. However, the fact that a party may be after to retrieve the fact that the computer system of records that have been "kept" or "maintained" as business records for subsequent use and consultation. See United States v. Jackson, 208 F.3d 633, 637 (7th Cir.2000); Michael H. Dore, Forced Preservation: Electronic Evidence and the Business Records Hearsay Exception, 11 Colum. Sci. & Tech. L.Rev. 76 (2010) ("Many electronic records ... remain in a company's files only because the company had a duty to preserve them once it reasonably anticipated litigation or a government subpoena. The company otherwise typically would have deleted those electronically stored data in the regular operation of its business to make room on its burdened servers.... [S]uch presumptive deletion undermines the trustworthiness and reliability of a business record, and thus the rationale of Rule 803(6). Courts should therefore focus on the unique elements of the creation and preservation of electronic evidence, and consider whether a company truly kept the record at issue in the course of business, or simply because a duty to preserve required it.").
- ² "Present sense impression" was the sole hearsay exception that Versata invoked in its pretrial submission in support of the admission of PX 310, although it also argued that the e-mail should

1. Is Website Content Admissible As A Treatsie?

2012 WL 2595275

Only the Westlaw citation is currently available.

United States District Court,

E.D. Texas,

Marshall Division.

VERSATA SOFTWARE, INC., f/k/a Trilogy Software, Inc.; and Versata Development Group, Inc., f/k/a Trilogy Development Group, Inc., Plaintiffs,

INTERNET BRANDS, INC., f/k/a
Carsdirect.com, Inc., Autodata Solutions
Company, and Autodata Solutions, Inc.,
Defendants.

Civil Action No. 2:08–cv–313–WCB. | July 5, 2012.

Samuel Franklin Baxter, McKool Smith. Marshall, TX, Demetrios Anaipakos, Kinan Hab Romman, Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing P.C., Houston, TX, Joel Lance Thollander, John Franklin Garvish, II, John Shumaker, Kevin M. Kneupper, Michael Laurie Kristina Scurry Baehr, Lavigna Fitzgerald, Leah Bhimani Buratti, Scott Lamar Cole, Victoria Wicken, McKool Smith, PC, Austin, TX, for Plaintiffs.

Michael P. Adams, Andrew John Schumacher, Brian Lawrence King, James Gene Ruiz, Winstead Sechrest & Minick, Austin, TX, David Bricker, Patrick A. Fraioli, Jr., Moldo Davidson Fraioli Seror & Sestanovich, Los Angeles, CA, Harry Lee Gillam, Jr., Melissa Richards Smith, Gillam & Smith, LLP, Marshall, TX, Jeffrey Allen Tinker, Winstead PC, Dallas, TX, for Defendants.

Attorneys and Law Firms

MEMORANDUM AND ORDER

WILLIAM C. BRYSON, Circuit Judge.

*1 In the course of trial held during the week of June 11th, 2012, the Court excluded a document that the plaintiffs sought to have admitted into evidence. The Court excluded the document on hearsay grounds and under Fed.R.Evid. 403. This Order describes the background against which the issue arose and sets forth the legal grounds for the Court's ruling.

I. Background

This evidentiary issue arose during litigation between plaintiffs (collectively "Versata") and defendants (collectively "Autodata"), both of which are providers of website software and services to automobile manufacturers. Among Versata's claims in the litigation were claims accusing Autodata of breach of contract and tortious interference with a prospective business relationship by misrepresenting to Chrysler Corporation the scope of a license that Autodata had from Versata.

At trial, Versata sought to introduce into evidence PX 310, an e-mail sent by Versata employee Mike Biwer to several other Versata employees. The e-mail was sent at 5:59 pm on Wednesday, June 25, 2008. The subject line reads, "Update from Randy on his meetings in Detroit today." The text reads, in pertinent part, as follows (ellipses in original):

Just a quick update from my conversation with Randy this afternoon....he is going to send out more complete notes later today or tomorrow....

- 1. Chuck Sullivan—lunch
- -cordial meeting
- -Chuck likes Versata ... inherited decision from Chrysler to move in a different direction

- ... i.e., AutoData (AD) ... the ship has set sail
- -feedback he has gotten is that there is little to no IP risk given the approach they are taken
 - >Chuck was told that AD has a license to our broader portfolio (not true)
 - >Randy does not feel Chuck fully understands the complexity of the issue or perhaps is not worried given what he's been told internally
- -this one is going to take several cycles to resolve
- -we need to work with Lance on developing options and next steps

More to follow ...

Mike

The substance of the luncheon meeting between Mr. Jacops ("Randy") of Versata and Mr. Sullivan ("Chuck") of Chrysler was an important issue during the trial. Mr. Jacops testified at trial regarding the meeting, and Mr. Sullivan testified by deposition about the same meeting. The contents of the Biwer e-mail, and in particular the line stating, "Chuck was told that AD has a license to our broader portfolio true)," potentially (not were therefore significant. The problem is that the e-mail consisted of hearsay, several layers deep.

First, the e-mail was an out-of-court statement by its author, Mr. Biwer. It is therefore hearsay to the extent it was offered to prove the truth of any of the assertions contained within it. Fed.R.Evid. 801(c). Second, Mr. Biwer's e-mail purported to report statements made to him earlier in the day by Mr. Jacops. Mr. Jacops's statements constitute a second layer of hearsay. Third, Mr. Biwer reported in the e-mail that Mr. Jacops had passed along statements made by Mr. Sullivan of Chrysler. The statements purportedly made by Mr. Sullivan regarding Autodata's rights with regard to Versata's intellectual property constitute a third layer of hearsay. Fourth, Mr. Biwer reported that Mr.

Jacops said that Mr. Sullivan "was told" that Autodata had a license to Versata's "portfolio." That statement is supplemented in the e-mail by the parenthetical comment, "not true." The statement of the unknown declarant who purportedly told Mr. Sullivan that Autodata had a license to Versata's portfolio constitutes a fourth level of hearsay. It is not clear whether the fourth declarant was the last in the chain of declarants, as the statement that Mr. Sullivan "was told" that Autodata had a license to Versata's portfolio does not make clear whether that statement came from someone at Autodata or someone at Chrysler who was passing on information obtained, directly or indirectly, from Autodata. The use of the passive voice ("was told") leaves that issue unclear. Finally, as to the parenthetical comment, it is entirely unclear who the declarant was—Mr. Biwer, Mr. Jacops, Mr. Sullivan, or someone else.

*2 When the issue of the admissibility of PX 310 first arose prior to trial, Versata argued that the e-mail was admissible either as non-hearsay, to supply context for other statements purportedly made at the luncheon meeting between Mr. Jacops and Mr. Sullivan, or under the hearsay exception for statements of present sense impression, Fed.R.Evid. 803(1). At that time, the Court ruled that the e-mail was not admissible under the "present sense impression" exception; however, the Court ruled that it could be admissible for non-hearsay purposes if its admission were accompanied by a limiting instruction advising the jury that the e-mail could not be considered for the truth of any assertions contained within it. As an example of the possible relevance of the document for nonhearsay purposes, the reference to the luncheon meeting between Mr. Jacops and Mr. Sullivan in the e-mail, which was dated June 25, 2008, helped identify the date of that meeting. Accordingly, when the e-mail was first offered during trial, the court admitted it subject to a limiting instruction directing the jury not to consider the e-mail for the truth of any of its contents.

Later in the trial, it became clear that the

relevance of the e-mail for non-hearsay purposes was marginal and the issue of what Autodata told Chrysler about its rights vis-à-vis Versata's intellectual property was important. The Court therefore reconsidered its decision to admit the e-mail subject to a limiting instruction and instead ruled the e-mail inadmissible for all purposes. The Court based its ruling on Fed.R.Evid. 403, finding that the risk of prejudice and the difficulty the jury would likely have in following the Court's limiting instruction under the circumstances outweighed the minimal relevance of the e-mail for any legitimate non-hearsay use at trial. See Nash v. United States, 54 F.2d 1006, 1007 (2d Cir.1932) (L.Hand, J.) (sometimes a limiting instruction amounts to a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else").

When the Court decided to exclude the e-mail, Versata changed its position with regard to the admission of the e-mail for non-hearsay purposes only and argued that the e-mail should be admitted without restriction. After giving Versata an opportunity to make an evidentiary proffer and hearing argument on the issue, the Court held that PX 310 was inadmissible as hearsay. At the close of all the evidence, the Court advised the jury that although PX 310 had previously been admitted subject to a limiting instruction, that exhibit was now excluded and was not to be considered by the jury for any purpose.

II. Discussion

The critical statement in the Biwer e-mail ("Chuck was told that AD has a license to our broader portfolio (not true)") presents multiple layers of hearsay. At trial, Versata argued that the e-mail was admissible either as non-hearsay or based on the sequential application of several hearsay exceptions, and it made a proffer and offered legal argument in support of admissibility. The Court disagreed and excluded the e-mail. Because the issue arose at a point during trial when there was no opportunity for

the Court to set forth the grounds for its ruling in detail, the Court stated at the time that it would likely issue an order on this issue to provide a fuller explanation of its ruling. This is that order.

A. Non-Hearsay

*3 Versata argued at trial that the Biwer e-mail was admissible to provide context for statements made at the luncheon meeting. To the extent context was important, the e-mail was not necessary to supply the context in which various statements may have been made at the luncheon meeting, as both parties to the meeting testified at trial—Mr. Jacops through live testimony and Mr. Sullivan by way of deposition. Moreover, the Court stated that if the e-mail were admitted for non-hearsay purposes, it would have to be accompanied by a limiting instruction, a proposition with which Versata agreed. Trial Tr. (June 13, AM session) 165. Yet the Court had previously concluded that the relevance of the email for non-hearsay purposes was outweighed by the risk of prejudice and confusion that would result from the admission of the e-mail subject to a limiting instruction. The Court reaffirmed that view during Versata's argument. Id. at 165-66. The Court continues to be of the view that the non-hearsay purposes for which Versata offered the e-mail were swamped in significance by the hearsay aspects of the e-mail and that it was proper to exclude the e-mail from evidence even if it had been accompanied by a limiting instruction directing the jury to use it only for non-hearsay purposes.

B. Hearsay Exceptions

Versata argued that various hearsay exceptions would apply to the e-mail, including the "business records" exception, Fed.R.Evid. 803(6), and the "present sense impression" exception, Fed.R.Evid. 803(1). The Court and counsel for Versata also discussed the exception for "then existing mental, emotional, or physical condition," Fed.R.Evid. 803(3).

None of those exceptions—separately or in conjunction—provides a sufficient platform for the admission of the Biwer e-mail. First, the email was not shown to be a record of the sort that qualifies for admission under the business records exception, as it was not prepared and retained as part of a routine recordkeeping system, but was simply an example of an occasional communication among Versata employees regarding events of interest affecting the company. Second, even if Mr. Biwer's email satisfied the formal requirements of the business records exception, Mr. Jacops's statements to Mr. Biwer that were reported in the e-mail do not qualify for admission under the present sense impression exception, as the critical portion of his statement to Mr. Biwer was not shown to have been made during the occurrence of the event reported or immediately thereafter. Third, even if Mr. Jacops's statements were admissible under the present sense impression exception, Versata has pointed to no convincing reason to conclude that Mr. Sullivan's statements contained in the e-mail would be admissible, either under that exception or any other.

The following is a more detailed discussion of each of Versata's proposed theories of admissibility.

1. Business Records

Versata argued at trial that the Biwer e-mail was admissible as a record of regularly conducted business activity under Rule 803(6). The Fifth Circuit has characterized that exception to the hearsay rule as requiring the following:

*4 (a) That the document have been made "at or near" the time of the matters recorded therein; (b) that the document have been prepared by, or from information transmitted by a person "with knowledge of the matters recorded"; (c) that the person or persons who prepared the document have been engaged in preparing it, in some undertaking, enterprise or business which can fairly be termed a "regularly conducted business activity"; (d)

that it have been the "regular practice" of that business activity to make documents of that nature; and (e) that the documents have been retained and kept in the course of that or some other regularly conducted business activity.

Wilander v. McDermott Int'l, Inc., 887 F.2d 88, 91 (5th Cir.1989), aff'd, 498 U.S. 337, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991); see also United States v. Ned, 637 F.3d 562, 569 (5th Cir.2011).

The reliability of business records—and the reason they are excluded from hearsay—"is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." Fed.R.Evid. 803(6) advisory committee's note; see also 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 803.08[2] (Joseph M. McLaughlin 2d ed. 1997) ("Memoranda that are casual, isolated, or unique do not qualify as business records.").

Tracing the business records exception back to its origins, Wigmore emphasized the importance of the requirement that the record in question be made as part of a "habit and system of making such a record with regularity." 5 John Henry Wigmore, Evidence in Trials at Common Law § 1522, at 442 (Chadbourn rev.1974). He explained that the entry must be "part of a series of entries or reports, not a casual or isolated one.... [A] memorandum casually made, would not answer this requirement." Id. § 1525, at 446. Likewise, the Supreme Court in its classic business records case, Palmer v. Hoffman, 318 U.S. 109, 113-14, 63 S.Ct. 477, 87 L.Ed. 645 (1943), explained that the critical element in making particular entries eligible for admission entries whether the were "made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls" for the business, such as "payrolls, accounts receivable, accounts payable, bills of lading and the like." As the Fifth Circuit put it, the rationale for the business records exception "rests on the assumption that business records are reliable because they are created on a day-to-day basis and '[t]he very regularity and continuity of the records are calculated to train the recordkeeper in habits of precision.' "*Rock v. Huffco Gas & Oil Co.*, 922 F.2d 272, 279 (5th Cir.1991), quoting *McCormick on Evidence* § 306 at 872 (3d ed.1984).

Applying those standards, the Court found at trial that Mr. Biwer's e-mail was not a regularly kept record within the meaning of the business records exception and thus lacked the features courts have identified as giving business records the reliability necessary to render them admissible against a hearsay objection. The Court reaffirms that finding now and concludes, for the following reasons, that the Biwer e-mail was not admissible under the business records exception to the hearsay rule.

*5 1. First, Versata has failed to show that the Biwer e-mail was made and kept in the course of a regularly conducted business and as a regular practice of the business. To be sure, in the course of Versata's proffer in support of the admission of PX 310 Mr. Jacops testified that communication via e-mail was a "regular business practice" at Versata and that one of the responsibilities of Versata employees was to "regularly send e-mails around that would recount ... meetings and conversations." Trial Tr. (June 13, AM session) 155:21-156:16. He also testified, however, that such e-mail updates were sent only "if there was something substantive which you'd want to communicate to the team, you would do it at the end of the day when you had time or wrapping things up." Trial Tr. (June 13, PM session) 14:12-24. While he testified that e-mails were used "to keep the team informed" as to matters of concern to the company, and "so that we would remember what we talked about and understood," Trial Tr. (June 13, AM session) 156:8-16, he did not testify that the e-mails were retained as company records to be consulted later and relied upon for purposes of company operations.

The essence of Mr. Jacops's testimony was that e-mails reporting on events pertinent to the business would be sent at a time convenient to the sender if the sender regarded the subject e-mail matter of the as worthy communicating to others. That evidence reflects the use of internal communications for information-sharing purposes based on instances of perceived need and convenience, not a system for preparing and retaining business records as a regular and routine practice. In that regard, Versata failed to show that documents such as Mr. Biwer's e-mail were prepared as a matter of business routine as opposed to sporadically, subject to the judgment of the maker of the document. See Wilander, 887 F.2d at 92 (concluding that hearsay statement should not have been admitted as a business record when "there was no showing that the document was kept in the course of some regularly conducted business activity or that it was the regular practice of the business to make such reports"); United States v. Robinson, 700 F.2d 205, 209–10 (5th Cir.1983) (notes of meetings were not admissible under Rule 803(6) because proponent never established that "it was the regular practice of that business activity" to have the notes made); see also United States v. Ramsey, 785 F.2d 184, 192 (7th Cir.1986) ("Occasional desk calendars, in which entries may or may not appear at the whim of the writer, do not have the sort of regularity that supports a reliable inference.").

2. A further problem with Versata's business records theory regarding the Biwer e-mail is that while Mr. Jacops testified that e-mails were created in the ordinary course of Versata's business, he did not testify that e-mails were routinely retained so as to be available for later use. That omission is important. The Fifth Circuit has emphasized the importance, for purposes of the business records exception, of showing that the records in question were "retained and kept in the course of ... regularly conducted business activity." Wilander, 887 F.2d at 91; see United States v. Holladay, 566 F.2d 1018, 1020 (5th Cir.1978) (holding that notebooks were admissible upon showing that

they were part of a bookkeeping system that was "continuously maintained" by defendant's business); United States v. Jones, 554 F.2d 251, 252 (5th Cir.1977) (record must be "made and preserved in the regular course of business"). In fact, the Fifth Circuit has noted that the fact that particular ledgers were destroyed at the end of each week might by itself defeat a showing that the ledgers were kept "in the course of a regularly conducted business activity." United States v. Wells, 262 F.3d 455, 460 n. 3 (5th Cir.2001). See also id. at 462 n. 8 (Rule 803(6) requires that a record be "made pursuant to established procedures for the routine and timely making and preserving of business records") (emphasis added); Rambus, Inc. v. Infineon Techs. AG, 348 F.Supp.2d 698, 705 (E.D.Va.2004) (business records exception requires that it be the regular practice of the business "to make and keep the record at issue"; declaration in support of admission of e-mail evidence as a business record "must show that the proffered record was made and kept as a regular practice by the business activity from which the document comes") (emphasis added).

*6 The careful analysis by Judge Rosenthal in *Canatxx Gas Storage Ltd. v. Silverhawk Capital Partners, LLC,* No. H–6–1330, 2008 WL 1999234 (S.D.Tex. May 8, 2008), makes this point clear. In that case, which involved a question as to the admissibility of an e-mail under the business records exception, the court explained that the proponent of an email

made by an employee about a business matter [under Rule 803(6)] must show that the employer imposed a business duty to make and maintain such a record. Courts examine whether it was the business duty of an employee to make and maintain emails as part of his job duties and whether the employee routinely sent or received and maintained the emails.

Id. at *12 (emphasis added). Judge Rosenthal then cited with approval three other cases in which the admissibility of emails under the business records exception was discussed. In the first, DirectTV, Inc. v. Murray, 307 F.Supp.2d Judge 764 (D.S.C.2004). Rosenthal characterized the ruling of the court as holding that sales records contained in emails were admissible "when the sales orders were regularly received by email and the emails were retained as records of each order" (emphasis added). In the second, New York v. Microsoft Corp., No. Civ A. 98-1233, 2002 WL 649951 (D.D.C. Apr. 12, 2002), she characterized the court's ruling as declining to admit e-mails under the business records exception because "there was a 'complete lack of information regarding the practice of composition and maintenance of' the emails" (emphasis added). In the third, United States v. Ferber, 966 90. 98 (D.Mass.1997), F.Supp. characterized the court's decision as holding that in order for an e-mail to be admissible under Rule 803(6), "there must be some evidence of a business duty to make and regularly maintain records of this type"; she noted that the court in that case excluded the proffered e-mails because, "while it may have been [an employee's] routine business practice to make such records, there was no sufficient evidence that [the employer] required such records to be maintained" (emphasis added).

In this case, Versata adduced evidence that Mr. Biwer prepared e-mails to update others within the company, but it did not introduce any evidence that he or the company routinely retained copies of those e-mails for later consultation. In fact, the intrinsic evidence from the Biwer e-mail tends to rebut any contention that the e-mail was part of a system of regularly maintained business records. The text of the e-mail strongly suggests that it was not intended to become a permanent record of the luncheon meeting, as Mr. Biwer wrote that the e-mail was "[i]ust a quick update on my conversation with Randy this afternoon he is going to send out more complete notes later today or tomorrow." In sum, Versata has failed to satisfy its burden of showing that the Biwer e-mail was one of a series of e-mails that were routinely "made and maintained in the normal course" of Versata's business. *Canatxx*, 2008 WL 1999234, at *13.

*7 Versata argued at trial that in an age of everincreasing reliance on electronic communication, the definition of business records must be broadened to encompass emails such as the one in question. The issue, however, is not the medium used to create the record, but the practice and process of the business in preparing the records in question. If the record—regardless of form—is made with regularity as part of the business's conduct of its affairs, it is regarded as more likely that the record will be accurate and complete, as the business's operations may depend on such records being maintained accurately. That rationale applies with less force to occasional communications among representatives of the business. In that setting, there is no special degree of reliability that is associated with the record—beyond the usual expectation that people will be honest and accurate in their business-related communications with others.

If occasional communications among employees of a business that relate to the operation of the business were to qualify as business records for purposes of Rule 803(6), that would convert the exception for "business records" into an exception for "business communications" and would open the door to a vast array of communications within a business, contrary to the conventional understanding of the business records exception. See Monotype Corp. PLC v. Int'l Typeface Corp., 43 F.3d 443, 450 (9th Cir.1994) (distinguishing between computer printouts of bookkeeping records and e-mails; "E-mail is far less of a systematic business activity than a monthly inventory printout. Email is an ongoing electronic message and retrieval system whereas an electronic inventory recording system is a regular, systematic function of a bookkeeper prepared in the course of business.").

3. Of course, even if the Biwer e-mail had satisfied the formal requirements of the business records exception, that would not render it admissible without more. As a general rule, the business records exception requires a showing that "each actor in the chain of information is under a business duty or compulsion to provide accurate information." United **States** McIntyre, 997 F.2d 687, 699 (10th Cir.1993); Fed.R.Evid. also 803(6) advisorv committee's note ("If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail."); 2 Kenneth S. Broun, McCormick on Evidence § 290 (6th ed.2006).

The Fifth Circuit has held that a document that otherwise qualifies as a business record but contains hearsay statements not within the personal knowledge of the maker of the record may be admitted if the hearsay statement or statements contained within the record are subject to other hearsay exceptions. Wilson v. Zapata Off-Shore Co., 939 F.2d 260, 271 (5th Cir.1991) ("[I]f the source of the information is an outsider, ... Rule 803(6) does not, by itself, permit the admission of the business record. The outsider's statement must fall within another hearsay exception to be admissible because it does not have the presumption of accuracy that statements made during the regular course of business have."); accord United States v. Patrick, 959 F.2d 991, 1000 (D.C.Cir.1992). In this case, even assuming that Mr. Biwer was acting pursuant to a business-imposed reporting duty, there was no showing that any of the other declarants were subject to a similar duty. And, as is discussed in the following sections, there was no other valid basis for overcoming the problems with those declarants' hearsay statements. The Biwer e-mail is therefore inadmissible as containing multiple hearsay, even if it otherwise qualifies as a business record.

*8 4. Finally, Rule 803(6) provides that even if

a document satisfies the formal requirements of the rule, it may not be admitted if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Certain factors surrounding the preparation of the Biwer e-mail cast further doubt on the trustworthiness of that document as an accurate record of what transpired at the luncheon meeting. First, Mr. Jacops testified that he and Mr. Sullivan did not discuss Autodata by name, see Trial Tr. (June 11, PM session) 48:13-14 ("[W]e didn't specifically discuss AutoData"); see also Trial Tr. (June 13, AM session) 159:7-12 ("Q: Now, at that meeting, you testified earlier names were never mentioned between [you] and ... Chuck; is that correct? ... A: Yes."). Yet the e-mail reports Mr. Sullivan as having said that he "was told that AD has a license to our broader portfolio." The insertion of Autodata into the statement constitutes a departure striking from Mr. Jacops's characterization of the Sullivan meeting in his testimony and gives rise to doubt as to how accurately Mr. Biwer reported the statements that were passed on to him. Second, the addition of the "not true" parenthetical indicates that the e-mail did more than merely recount the conversation with Mr. Sullivan: it also contained editorial comments of either Mr. Jacops or Mr. Biwer. Third, as noted, the e-mail indicated that Mr. Jacops was "going to send out more complete notes later today or tomorrow." That statement suggests that the account of the lunch in the e-mail was necessarily abridged and incomplete. All of those factors indicate that Mr. Biwer's report of the meeting between Mr. Jacops and Mr. Sullivan may have been essentially a "rough translation" accompanied by editorial commentary, rather than a faithful account of the facts of the event.

2. Present Sense Impression

Versata seeks to address the problem of the second declarant, Mr. Jacops, by invoking Fed.R.Evid. 803(1), the exception for statements setting forth the declarant's "present sense impression." Rule 803(1) provides an exception

to the hearsay rule for "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." Fed.R.Evid. 803(1). "The justification for this exception hearsay relies the contemporaneousness of the event under consideration and the statement describing that event. Because the two occur simultaneously, there is almost no 'likelihood of [a] deliberate or conscious misrepresentation." Rock, 922 F.2d at 280, quoting Fed.R.Evid. 803(1) advisory committee's note; see also United States v. Peacock, 654 F.2d 339, 350 (5th Cir.1981) (statement that was otherwise hearsay was properly admitted because it was immediately repeated to a third party and "[t]here was no time for [the declarant] to consciously manipulate the truth").

Mr. Jacops testified that he called Mr. Biwer within "a matter of minutes" after the conclusion of the luncheon meeting. See Trial Tr. (June 13, AM session) 155:15. That by itself, however, does not establish that Mr. Sullivan's statement, which was made at some point during the luncheon, was reported to Mr. Biwer "while or immediately after the declarant perceived it," as required by the rule. Mr. Jacops did not say at what point in the course of the lunch Mr. Sullivan made the statement about Autodata's alleged license rights. But his testimony makes clear that the period of delay between the statement and Mr. Jacops's report to Mr. Biwer was a combination of the time it took to complete the luncheon after the "license rights" comment, plus the "matter of minutes" that Mr. Jacops said went by after the conclusion of the luncheon and before he reported the events of the meeting to Mr. Biwer. The cases on which Versata relied at trial to establish the contemporaneity of the events and the declarant's present sense impression of those events, United States v. Portsmouth Paving Co., 694 F.2d 312, 323 (4th Cir.1982), and United States v. Danford, 435 F.3d 682, 687 (7th Cir.2005), both involved a declarant's reporting of the contents of a telephone conversation immediately upon its conclusion Portsmouth, "no more than a few seconds" after

the conversation ended; in Danford, "less than a minute after the conversation ended). The Fifth Circuit, in a case involving Rule 803(1), agreed with the District of Columbia Circuit that a delay of 15 to 45 minutes in reporting an incident does not qualify reporting the incident "immediately" after it occurred. See United States v. Cain, 587 F.2d 678, 681 (5th Cir.1979), citing Hilver v. Howat Concrete Co., 578 F.2d 422, 426 n. 7 (D.C.Cir.1978) ("an outof-court statement made at least fifteen minutes after the event it describes is not admissible unless the declarant was still in a state of excitement resulting from the event [which would render the statement admissible under the 'excited utterance' exception to the hearsay rule, Fed.R.Evid. 803(2)]"). The rationale for the requirement of contemporaneity is that the "substantial contemporaneity of event and statement negate the likelihood of deliberate or misrepresentation." Fed.R.Evid. conscious 803(1) advisory committee's note. When a statement is made while the declarant is observing the event being perceived or immediately thereafter, the declarant will have no time for reflection. McCormick emphasizes the requirement that the statement be made "immediately" after the event being reported, noting that "[w]hile principle might seem to call for a limitation to exact contemporaneity, some allowance must be made for the time needed for translating observation into speech. Thus, the appropriate inquiry is whether sufficient time elapsed to have permitted reflective thought." McCormick on Evidence § 271, at 254.

*9 In this case, it seems highly likely that the period of time between when the statement was made during the luncheon meeting and when Mr. Jacops reported the statement to Mr. Biwer after the conclusion of the meeting was sufficient for reflection; it was certainly longer than the period needed "for translating observation into speech." In any event, the burden of showing the elements of admissibility for a statement under the present sense impression exception, like the burden on evidentiary issues generally, is on the proponent of the evidence. See Bemis v. Edwards, 45 F.3d

1369, 1373 (9th Cir.1995); Miller v. Keating, 754 F.2d 507, 511 (3d Cir.1985); see also Bourjaily v. United States, 483 U.S. 171, 176, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987); United States v. Two Shields, 497 F.3d 789, 793 (8th Cir.2007); Lewis v. CITGO Petroleum Corp., 561 F.3d 698, 705 (7th Cir.2009). Versata's evidence of contemporaneity, limited to Mr. Jacops's testimony that he called Mr. Biwer within "a matter of minutes" after the conclusion of his luncheon with Mr. Sullivan, did not satisfy its burden of establishing that Mr. Jacops's statements to Mr. Biwer were made at the time of Mr. Sullivan's comments or "immediately thereafter," as that term is used in Rule 803(1).

While all this may appear to have a hypertechnical flavor to it, the passage of time between event and statement is vitally important to the applicability of the present sense impression exception. "The idea of immediacy lies at the heart of the exception, thus, the time requirement underlying the exception is strict it is *the* factor that because trustworthiness." See United States v. Green, 556 F.3d 151, 155 (3d Cir.2009) (citations and internal quotations omitted). In that context, the imprecision of Versata's evidence as to the period of delay between Mr. Sullivan's statement during the luncheon and Mr. Jacops's report of that statement in his post-luncheon telephone call to Mr. Biwer is fatal.

To the extent that Versata argues that the present sense impression exception applies to declarations.² the evidence Biwer's indicates that Mr. Biwer's e-mail was not prepared until several hours after conversation with Mr. Jacops. Mr. Jacops and Mr. Sullivan met for lunch, but Mr. Biwer's email was sent at approximately 6 p.m. that evening, presumably long after the luncheon meeting had ended. That span of time destroys the contemporaneousness that is required to make the statements fall under the exception in Rule 803(1). See Rock, 922 F.2d at 280 (affirming trial court's inadmissibility ruling for "not filed accident reports that were

immediately following [the] alleged accident, but only after two days had passed"); *Cain*, 587 F.2d at 681; *cf. First State Bank of Denton v. Md. Cas. Co.*, 918 F.2d 38, 42 (5th Cir.1990) (statements to dispatcher about whether a person was at home satisfied Rule 803(1) when made "virtually on the heels of the discovery that [that person] was not at home"); *Canatxx*, 2008 WL 1999234, at *14 (e-mail admissible as present sense impression where writer "stated in his affidavit that the email was sent '[a]s soon as I finished my conversation with Blackmon,' " and "[t]he email itself states that Blackmon had 'just called' ").

3. State of Mind

*10 Versata faces an even bigger hurdle in attempting to show why Mr. Sullivan's statements are not excludable as hearsay. Mr. Biwer's e-mail reports that Mr. Sullivan told Mr. Jacops that he (Mr. Sullivan) had been told that Autodata "has a license to [Versata's] broader portfolio." To the extent the statement was offered to show the truth of the matter asserted—i.e., that Mr. Sullivan had been told that Autodata had a broad license to Versata's intellectual property—the statement was plainly hearsay. Versata made clear at trial that it wished to use the statement for that purpose. As Sullivan's statement such, Mr. inadmissible, as none of the hearsay exceptions apply. The statement was obviously not a business record, it was not a statement of present sense impression by Mr. Sullivan, and it was not a party admission, see Fed.R.Evid. 801(d)(2), because Chrysler (Mr. Sullivan's employer) was not a party to the lawsuit.³

To the extent that Versata argues that Mr. Sullivan's statement was admissible under Fed.R.Evid. 803(3) as a statement reflecting Mr. Sullivan's state of mind, the statement clearly fails to satisfy the requirements of that rule. Rule 803(3) provides an exception to the hearsay rule for a "statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional ... condition (such

as mental feeling ...)." Before a statement which would otherwise be hearsay may be admitted under Rule 803(3) "to show the declarant's then existing state of mind, the declarant's state of mind must be a relevant issue in the case." *Rock*, 922 F.2d at 279, quoting *Prather v. Prather*, 650 F.2d 88, 90 (5th Cir.1981).

Even if Mr. Sullivan's purported statement that he had been told that Autodata had a license to Versata's portfolio reflected something about Mr. Sullivan's state of mind, his state of mind was not a relevant issue in the case. Versata was seeking to use the statement to prove that Autodata had made a claim regarding its rights to use Versata's technology, not to show something about Mr. Sullivan's mental state. Moreover, even if the statement could be regarded as relevant to Mr. Sullivan's state of mind and even if Mr. Sullivan's state of mind on that matter were somehow material, the e-mail would have to have been admitted subject to a limiting instruction "to insure that assertions as to particular facts contained in the statement will be considered by the jury solely as bearing upon the declarant's state of mind" and not for the truth of the factual matter asserted. 30B Michael H. Graham, Federal Practice & Procedure § 7044, at 438 (2006). But, as indicated earlier, the Court did not (and does not) regard the limiting instruction as adequate under the circumstances of this case and therefore excluded the evidence under Rule 403.

The hearsay rules bar parties from using the state of mind exception as a means of introducing statements of memory or belief in order to prove the matter remembered or believed. In fact, the state of mind exception in the Federal Rules of Evidence contains an express limitation designed to guard against the use of that exception as a vehicle for introducing evidence for such purposes. The rule provides (with one exception not applicable here) that the hearsay exception for statements reflecting the declarant's state of mind does not include "a statement of memory or belief to prove the fact remembered or believed." Fed.R.Evid. 803(3).

As the advisory committee notes confirm, that provision was added because it was regarded as necessary to avoid "the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind." Fed.R.Evid. 803(3) advisory committee's note. That proposition has been a mainstay of hearsay law for years and has been applied faithfully since the enactment of the Federal Rules of Evidence. See Shepard v. United States, 290 U.S. 96, 105-06, 54 S.Ct. 22, 78 L.Ed. 196 (1933); United States v. Liu, 960 F.2d 449, 452 (5th Cir.1992); Prather, 650 F.2d at 90; United States v. Cohen, 631 F.2d 1223, 1225 (5th Cir.1980): United States v. 345 F.3d 1280, 1283 (11th Samaniego, Cir.2003).

*11 Mr. Sullivan's declaration therefore does not fall within any hearsay exception; the hearsay nature of that declaration is sufficient by itself to render PX 310 inadmissible.

C. The Timing of the Court's Ruling

The Court informed the jury of its decision to exclude the e-mail from evidence at the close of all the evidence in the trial. See Trial Tr. (June 15, AM session) 144:4–145:3. After the jury left the courtroom, Versata objected to the Court's instruction, arguing that the timing of the instruction was prejudicial. In part, Versata's objection stemmed from concern that Autodata might comment on the withdrawal of the e-mail from evidence as reflecting adversely on Versata. The Court, however, stated that it would not allow Autodata's counsel to comment that matter, and Autodata faithfully complied. In part, Versata objected to the timing of the Court's informing the jury that the exhibit had been excluded, coming as it did at the close of the evidence at trial and only a few hours before the jury retired for deliberations.

The reason the Court chose that time to inform the jury that PX 310 had been excluded was to avoid possible prejudice to one side or the other. If the Court had informed the jury during or at the end of the plaintiff's case that the exhibit had been excluded, it is possible that the jury would have inferred that some important element of the plaintiff's case had been struck from the record. Likewise, if the Court had given its explanation to the jury during or at the end of the defense case, the jury might have inferred that the ruling reflected adversely on the defense. Advising the jury about the disposition of PX 310 as part of the housekeeping matters that came at the close of the evidence and before the jury's luncheon break on the last day of trial seemed to be the most neutral time. Following counsel's objection, the Court invited counsel to propose a

curative instruction, but counsel declined. The Court concludes that the manner in which the jury was informed that PX 310 had been withdrawn from evidence was not prejudicial to Versata.

For all of the foregoing reasons, the Court confirms its prior ruling that PX 310 was properly excluded at trial.

All Citations

Not Reported in F.Supp.2d, 2012 WL 2595275, 88 Fed. R. Evid. Serv. 1163

Footnotes

- The fact that a copy of the Biwer e-mail was produced for trial purposes does not establish that such e-mails were routinely retained for consultation and use. Copies of electronic correspondence are frequently subject to retrieval, at least absent affirmative steps to eradicate them from a computer system. However, the fact that a party may be able to retrieve an electronic record, such as in connection with litigation, does not mean that the party has retained that document in a system of records that have been "kept" or "maintained" as business records for subsequent use and consultation. See United States v. Jackson, 208 F.3d 633, 637 (7th Cir.2000); Michael H. Dore, Forced Preservation: Electronic Evidence and the Business Records Hearsay Exception, 11 Colum. Sci. & Tech. L.Rev. 76 (2010) ("Many electronic records ... remain in a company's files only because the company had a duty to preserve them once it reasonably anticipated litigation or a government subpoena. The company otherwise typically would have deleted those electronically stored data in the regular operation of its business to make room on its burdened servers.... [S]uch presumptive deletion undermines the trustworthiness and reliability of a business record, and thus the rationale of Rule 803(6). Courts should therefore focus on the unique elements of the creation and preservation of electronic evidence, and consider whether a company truly kept the record at issue in the course of business, or simply because a duty to preserve required it.").
- "Present sense impression" was the sole hearsay exception that Versata invoked in its pretrial submission in support of the admission of PX 310, although it also argued that the e-mail should be admitted as non-hearsay to show the context of statements reportedly made at the luncheon meeting.
- Nor would the statement reported in the e-mail be admissible under Fed.R.Evid. 801(d)(1), even if it were regarded as inconsistent with Mr. Sullivan's deposition testimony that was read at trial. That is because Mr. Sullivan's prior statement (the one reported in the e-mail) was not "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." Fed.R.Evid. 801(d)(1)(A).